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TABLE OF CASES CITED

STATUTES CITED

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 57.

STATE OF MISSOURI EX REL. LLOYD L. GAINES, PETITIONER,

VS.

S. W. CANADA, REGISTRAR OF THE UNIVERSITY OF MISSOURI, AND THE CURATORS OF THE UNIVERSITY OF MISSOURI, RESPONDENTS.

REFERENCE TO OPINION BELOW.

The opinion below (not yet officially reported) appears in 113 S. W. (2d) 783, and at pages 210-224 of the record.

STATEMENT OF THE CASE.

This case is pending upon a petition for certiorari to review a judgment of the Supreme Court of Missouri, affirming a judgment of the Circuit Court of Boone County, Missouri, denying a writ of mandamus. Petitioner sought mandamus to compel respondents, the

Registrar and Board of Curators of the University of Missouri, to admit petitioner, a negro, as a student in the School of Law in the University of Missouri. The Supreme Court of Missouri held that respondents had properly denied petitioner's application for admission (a) because the laws of Missouri provide for separation of the races for the purpose of higher education, and do not entitle a negro to admission as a student in the University of Missouri; and (b) because by the Lincoln University Act (Secs. 9616-9624, R. S. Mo., 1929) the state had provided for petitioner an opportunity to receive a legal education which is equal to that provided for white students in the University of Missouri, and therefore petitioner's rights under the equal protection clause of the Fourteenth Amendment were not infringed (R. 210-224).

In his petition and supporting brief petitioner omits material facts, erroneously states other facts, and in several instances makes half true statements which convey a misleading impression of the evidence. We therefore deem it necessary to submit our own statement of the case.

Petitioner, a young man now 27 years of age, a native of Mississippi, came to Missouri in 1926 and received his education in free public schools maintained by Missouri for the education of negroes, including education in common school, high school and in Lincoln University, a state university for negroes. He was graduated from the latter institution in August, 1935, with an A.B. degree (R. 210, 57, 78-79). He thereupon made application for admission as a student in the school of law in the University of Missouri (R. 210, 63), and later filed with its registrar a transcript of his credits as a student in Lincoln University (R. 60-61, 64). Petitioner's communication with the registrar was entirely by

correspondence, and until he filed the transcript of his credits from Lincoln University there was nothing in the correspondence to apprise the registrar that petitioner was a negro (R. 60).

Upon the filing of the transcript from Lincoln University it became obvious to the registrar that petitioner must be a negro. Thereupon the registrar telegraphed petitioner suggesting that he communicate with President Florence of Lincoln University regarding arrangements for his legal education (R. 65). President Florence then wrote petitioner calling his attention specifically to the provisions of the Lincoln University Act of 1921, and offering petitioner aid thereunder (R. 72-73). This act provides higher education for negroes equal to that furnished to white students in the University of Missouri (Sec. 9618, R. S. Mo., 1929), and provides that pending the full development of Lincoln University the Lincoln University board of curators shall arrange for the attendance of any negro resident of Missouri at the university of any adjacent state, to take any course of study which is provided in the University of Missouri but which is not taught at Lincoln University; and requires the Lincoln University curators to pay the tuition fees for such temporary out-of-state attendance (Sec. 9622, R. S. Mo., 1929).

Petitioner admits that he was thus fully advised of the provisions made for his benefit by the Lincoln University Act of 1921, and that he fully understood his rights under that statute. He says that after full consideration he deliberately refused to avail himself of such rights (R. 74, 82, 83, 84). He testifies that within two days after he received President Florence's letter calling his attention to his right to receive a legal education through Lincoln University, he got in communication with the National Association for the Advancement

of Colored People (R. 82), and discussed his rights with the counsel for that association (R. 84), who advised him to refuse to avail himself of the rights provided for him by the Lincoln University Act, and to "keep on corresponding with Missouri University" (R. 84).

In a deposition taken before trial petitioner was asked whether, if a good law school were established at Lincoln University on a par with the one at the University of Missouri, he would attend it; and on the advice of counsel petitioner refused to answer this question (R. 88-89).

Petitioner admitted that he had refused to avail himself of any of the rights provided for him by the Lincoln University Act (R. 85-86), and had never made application to Lincoln University for education in the law, either in a school of law to be established in that institution, or, pending that, in a law school in the state university of any one of the four adjacent states which admit negroes as students (R. 218, 219, 85-86, 136-137). The law schools in the state universities in each of these four adjacent states (Kansas, Nebraska, Iowa and Illinois) admit nonresident negroes as students (R. 87-88); and petitioner is eligible, from a scholastic standpoint and otherwise, to become a student in any one of these four schools (R. 219, 90-91):

If he had seen fit to accept the opportunity open to him, he would have had the right to call upon the Lincoln University curators for an education in the law; and it would have then become the mandatory duty of the Lincoln University curators (*Lincoln University* v. *Hackmann*, 295 Mo. 118, 124) to establish a school of law in Lincoln University up to the standard of the law school in the University of Missouri (Sec. 9618, R. S. Mo., 1929); and, pending that, to arrange for petitioner's attendance at the school of law in any of the four adjacent state

universities which petitioner might select, and to pay petitioner's tuition fees therein (Sec. 9622, R. S. Mo., 1929).

The petitioner's expense of travel to these adjacent state universities would have been no greater than the traveling expense of students living in various parts of Missouri, who attend the University of Missouri at Columbia (R. 219-220, 90, 151-153); and he would necessarily have had to pay living expenses, regardless of which university he attended (R. 220).

During the time that petitioner might temporarily attend an adjacent state university, pending the establishment of a school of law in Lincoln University, the Lincoln University curators would be required by the statute to pay the full amount of his tuition fees (Sec. 9622, R. S. Mo., 1929). These tuition fees for the first year of the law course range from $109.75 to $178.00 in the four schools (R. 220, 157-8, 159-160, 161, 162). White students attending the school of law in the University of Missouri must pay their own tuition fees, which for the first year amount to $127.50 (R. 220, 154-155), and they receive no reimbursement from the state. Petitioner would, therefore, temporarily enjoy a pecuniary advantage over white students of law attending the University of Missouri, pending the establishment of a school of law in Lincoln University.

The law schools in the universities of the adjacent States of Kansas, Nebraska, Iowa and Illinois are each schools of high standing, members of the Association of American Law Schools, and on the approved list of the American Bar Association (R. 219, 113). Petitioner's evidence shows without dispute that a student desiring to practice law in Missouri can get as sound, comprehensive and valuable legal education in any one

of these four adjacent law schools as he could get in the University of Missouri Law School (R. 219, 117-118). In each of these four adjacent law schools, and in the law school of the University of Missouri, the system of education is exactly the same; and the aim and purpose of the schools, as of all modern law schools, is to give the student such fundamental education in the law as will serve as a basis for the practice of law in any state where the Anglo-American system of law obtains (R. 219, 109). In all of these schools in adjacent states the casebook system of instruction is used (R. 109, 113); and the courses of study and the casebooks used are substantially identical with those in the University of Missouri Law School (R. 219, 155-157, 158-159, 160, 161, 162-163). It frequently happens that law students transfer from one to another of these five law schools (in Missouri, Kansas, Nebraska, Iowa and Illinois Universities); and the courses of study and the quality of instruction in the five schools are so nearly identical that the student loses no time when he transfers, receives full credit for the work done in his former school, and moves right along without any hiatus or loss of stride (R. 219, 114).

In the trial court the petitioner alleged that the school of law in the University of Missouri specializes in Missouri law and procedure, and that in no other school could he study Missouri law and procedure to the same extent and on an equal level of scholarship and intensity (R. 16). The evidence fails to sustain this allegation, and conclusively disproves it. The University of Missouri Law School does not specialize in Missouri law and procedure (R. 219, 99, 100). The school is in no sense a provincial law school adapted merely to educate lawyers for practice in Missouri only

(R. 109). The school teaches the general common-law system as practiced throughout the United States (R. 109). The aim is to lay a thorough general foundation for the practice of law in any jurisdiction where the Anglo-American system of jurisprudence obtains (R. 219, 109, 118). The casebooks used in the school are used generally in law schools over the country, including Columbia, Northwestern, Harvard (R. 116), Kansas University, Nebraska University, Iowa University and Illinois University (R. 109). The casebooks do not contain a disproportionately high number of Missouri cases, there being 6,966 cases in all of the casebooks used in the three-year law course, of which only 97 or 1.2 per cent are Missouri cases (R. 219, 111-113). In the courses taught at the University of Missouri Law School there is no more instruction on Missouri law than would be given a student at the Harvard University Law School (R. 116). Of 3,284 applicants for admission to the bar in Missouri in the five-year period, 1931 to 1935, only 246 applicants studied law at the University of Missouri Law School (R. 144-145). Some of the best lawyers in Missouri are graduates of law schools in other states (R. 117). Upon the foregoing evidence, all of which is a part of petitioner's proof and is undisputed, the Missouri Supreme Court found against petitioner upon his contention that the University of Missouri Law School specializes in Missouri law and procedure (R. 219).

There has never been any demand upon Lincoln University by any negro for a legal education (R. 222, 136, 137). Consequently, no school of law has, up to this time, been established in Lincoln University (R. 77). However, prior to the institution of this suit, the Lincoln University curators were making a complete survey of

the whole subject of negro education in Missouri, to determine what Lincoln University should do for the negro people of the state which it was not already doing; and on the basis of this survey were planning a definite program of expansion (R. 130).

A law school in Lincoln University could be established and operated for a small class, on a level of scholarship and training equal to that in the University of Missouri Law School, for a maximum of $10,000.00 per year (R. 185-186). The library of the Supreme Court of Missouri, one of the most complete law libraries in the state, and a better one than that at the University of Missouri Law School, is located a few blocks from Lincoln University, and is open to the public both day and night (R. 145, 193). A student in a small class would receive more intensive training than a student would receive in a class of 30 to 50 students, and would practically have the advantage of a private tutor (R. 186). If petitioner were admitted as a student in the University of Missouri Law School, and were taught in a separate class from the white students in accordance with the public policy and tradition of the state, the expense to the state would be as great as it would be to establish a law school in Lincoln University (R. 186).

Petitioner's own evidence shows that the State of Missouri is a pioneer among the states in the field of higher education for negroes, and is the only state in the Union which has established a separate university for negroes on the same basis as the state university for white students (R. 138). Dr. J. D. Elliff testified that during the five years of his incumbency as chairman of the board of curators of Lincoln University, the General Assembly has always given Lincoln University substantially all the money requested by its board for maintenance, operation, expansion and general purposes (Rec.

137). From 1921 to 1935, inclusive, the state has appropriated to Lincoln University $3,477,153.49 (Laws Mo., 1921, pages 65, 87, 101; Laws Mo., 1923, pages 51, 60, 96; Laws Mo., 1925, pages 57, 78; Laws Mo., 1927, page 88; Laws Mo., 1929, pages 24, 101; Laws Mo., 1931, page 46; Laws Mo., 1933, pages 124, 130; Laws Mo., 1935, page 66). From this total, $500,000.00 was eliminated by the decision in *Lincoln University* v. *Hackmann,* 295 Mo. 118, so the net balance appropriated in these years was $2,977,153.49 (R. 149-150). These appropriations included hundreds of thousands of dollars available for the salaries of professors and instructors generally, as well as for general expenses—thus providing ample funds for the establishment of any professional or graduate courses for which any need might arise (see Appropriation Acts copied in Appendix).

The unexpended balances in the Lincoln University funds were $311,061.74 on August 9, 1935, the date when petitioner was graduated from Lincoln University and was ready to begin his legal education (R. 8); $298,620.16 on September 6, 1935, the date when the University of Missouri and Lincoln University respectively began their fall semesters; and $159,870.73 on April 17, 1936, when this suit was filed (R. 147).

Supplementing the appropriations to Lincoln University above referred to, the General Assembly in the years 1929 to 1935, inclusive, appropriated additional sums aggregating $55,615.91 as funds available for payment of out-of-state tuition fees (Laws Mo., 1929, page 61; Laws Mo., 1931, page 28; Laws Mo., 1933, pages 9, 87; Laws Mo., 1935, page 113). This special fund is administered by the state superintendent of schools (R. 165-169) who is *ex officio* a member of the Lincoln University board of curators (Sec. 9617, R. S. Mo., 1929). In this special

tuition fund the unexpended balance on August 9, 1935, and September 6, 1935, was $6,351.18, and on April 17, 1936, was $2,214.98 (R. 220-221, 165).

While petitioner's counsel in their brief speak disparagingly of Lincoln University, the petitioner himself, who received his academic education there, admits that Lincoln University is a well-managed, well-conducted university, on a plane with the University of Missouri as far as he knows (R. 79-80, 80-81). The record shows that the value of Lincoln University's land, buildings and equipment has grown from $362,000.00 in 1930 to $868,854.00 in 1936 (R. 138).

No negro has ever attended or been received as a student in the University of Missouri; no negro except petitioner has ever applied for admission as a student; and it has always been the public policy of the state to provide separate educational systems for negroes and whites (R. 169-170, 171-172, 174-184).

Petitioner admits that he understood it to be the public policy, law and Constitution of Missouri to separate negro and white children for the purposes of education (R. 81). He admits he knew that Lincoln University was established for negroes and the University of Missouri was established for whites (R. 81); yet with this knowledge he nevertheless made application for enrollment as a student in the University of Missouri (R. 82).

The curators of the University of Missouri rejected petitioner's application upon grounds stated in the following resolution, copy of which was by the registrar furnished to petitioner (R. 210, 70-71):

> "Whereas, Lloyd L. Gaines, colored, has applied for admission to the School of Law of the University of Missouri, and
>
> "Whereas, the people of Missouri, both in the Constitution and in the Statutes of the State, have

provided for the separate education of white students and negro students, and have thereby in effect forbidden the attendance of a white student in Lincoln University, or a colored student at the University of Missouri, and

"Whereas, the Legislature of the State of Missouri, in response to the demands of the citizens of Missouri, has established at Jefferson City, Missouri, for negroes, a modern and efficient school known as Lincoln University, and has invested the Board of Curators of that institution with full power and authority to establish such departments as may be necessary to offer to students of that institution opportunities equal to those offered at the University, and have further provided, pending the full development of Lincoln University, for the payment, out of the public treasury, of the tuition, at universities in adjacent states, of colored students desiring to take any course of study not being taught at Lincoln University, and

"Whereas, it is the opinion of the Board of Curators that any change in the State system of separate instruction which has been heretofore established, would react to the detriment of both Lincoln University and the University of Missouri,

"Therefore, be it resolved, that the application of said Lloyd L. Gaines, be and it hereby is rejected and denied, and that the Registrar and the Committee on entrance be instructed accordingly."

Senator F. M. McDavid, president of the respondent board of curators, testified that in rejecting petitioner's application the board of curators acted from no other motive or reason than a desire to obey what it conceived to be the mandate of the constitution, the law and the public policy of the state, requiring separation of the races for the purpose of education (R. 175-176); that the board as such has never had any policy on this subject,

and never had any occasion to formulate any policy until petitioner attempted to gain admission; and that when for the first time in the history of the institution a negro (petitioner) applied for admission, the board acted on what it conceived to be its duty under the law (R. 176).

Senator McDavid further testified that the admission of negroes into the University of Missouri would create a great amount of trouble, and would make discipline very difficult; that every student and every citizen knows the traditions of this state and of the university, running through nearly a hundred years, respecting this matter; and that to admit a negro into the University of Missouri would be subversive of discipline, which is a matter of very great importance; and that this feature also was taken into consideration by the board in ruling on petitioner's application (R. 177).

From the circuit court's judgment denying mandamus (R. 53-54) petitioner appealed to the Supreme Court of Missouri (R. 55), which latter court, in an opinion concurred in by all its seven judges, affirmed the judgment (R. 209-224).

SUMMARY OF THE ARGUMENT.

I.

This case does not present a substantial federal question reviewable by this court.

The state court held that the laws of Missouri do not entitle petitioner to be admitted as a student in the University of Missouri, and held that those laws provide for race separation for purposes of higher education (R. 211-216). This construction of the laws of Missouri is binding here.

Senn v. *Tile Layers' Protective Union*, 301 U. S. 468, 477.

Midland Realty Co. v. *Kansas City Power & Light Co.*, 300 U. S. 109, 113.

Atchison, Topeka & Santa Fe Ry. Co. v. *Railroad Commission of California*, 283 U. S. 380, 390-1.

Coombes v. *Getz*, 285 U. S. 434, 441.

Memphis & C. Ry. Co. v. *Pace*, 282 U. S. 241, 244.

Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 480.

Roe v. *State of Kansas ex rel. Smith*, 278 U. S. 191, 193.

Ex Parte Worcester County National Bank, 279 U. S. 347, 359.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 680.

Hanover Fire Insurance Co. v. *Carr*, 272 U. S. 494, 509.

Dorchy v. *State of Kansas*, 272 U. S. 306, 308.

Swiss Oil Corporation v. *Shanks*, 273 U. S. 407, 411-412.

State of Missouri ex rel. Hurwitz v. *North*, 271 U. S. 40, 41.

Keith v. *Johnson*, 271 U. S. 1, 8.
Wadley Southern Ry. Co. v. *State of Georgia*, 235 U. S. 651, 657-8.

The state court unequivocally held that petitioner is entitled to educational facilities substantially equal to those afforded white citizens (R. 218), but found as a fact that the facilities provided by the state for petitioner are substantially equal to those afforded white students (R. 218-224). This finding of fact is based upon substantial and uncontradicted evidence (R. 109, 113, 114, 117-118, 157-8, 158-9, 160, 161, 162-3); and it is binding here.

Northern Pacific Railway Co. v. *North Dakota*, 236 U. S. 585, 593.
Thomas v. *Texas*, 212 U. S. 278, 281.
Grayson v. *Harris*, 267 U. S. 352, 357.
Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 393-4.
Waters-Pierce Co. v. *Texas Company*, 212 U. S. 88, 97.
Willoughby v. *Chicago*, 235 U. S. 45, 50.
Interstate Amusement Co. v. *Albert*, 239 U. S. 560, 567.

Petitioner does not, and truthfully cannot, claim that this finding of fact by the state court is unsupported by the evidence.

Petitioner's refusal to avail himself of the educational facilities provided for him by the State of Missouri under the Lincoln University Act (R. 218-219, 222, 74, 82, 83, 84), is an insuperable obstacle to his recovery.

McCabe v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 163-4.

This case does not fall within Paragraph 5 of Rule 38 of this court, because (a) the state court's decision does

not involve a substantial federal question; (b) the decision is in accord with applicable decisions of this court (*Plessy* v. *Ferguson*, 163 U. S. 537, 544; *Gong Lum* v. *Rice*, 275 U. S. 78; 85, 86; *Cumming* v. *Board of Education*, 175 U. S. 528; *Hall* v. *DeCuir*, (concurring opinion) 95 U. S. 485, 504-506); and (c) there is no showing of "special and important reasons" for the issuance of certiorari.

II.

The State of Missouri has not denied petitioner the equal protection of the laws by excluding him from the School of Law of the University of Missouri.

Race separation for purposes of education does not infringe the rights of either the white or negro race guaranteed by the Fourteenth Amendment.

Plessy v. *Ferguson*, 163 U. S. 537, 544.

Gong Lum v. *Rice*, 275 U. S. 78, 85-86.

Hall v. *DeCuir*, 95 U. S. 485, 504-506 (concurring opinion).

Lehew v. *Brummell*, 103 Mo. 546, 551-552.

Younger v. *Judah*, 111 Mo. 303, 310.

Bertonneau v. *Board of Directors*, 3 Fed. Cases 294, 296.

Wall v. *Oyster*, 36 App. D. C. 50, 31 L. R. A. (N. S.) 180, 185.

State ex rel. v. *McCann*, 21 Ohio 198, 209-211.

McMillan v. *School Committee*, 107 N. C. 609, 12 S. E. 330, 331.

Lowery v. *Board of Trustees*, 140 N. C. 33, 52 S. E. 267, 272.

Johnson v. *Board of Education*, 166 N. C. 468, 82 S. E. 832, 834, 835.

Martin v. *Board of Education*, (W. Va.) 26 S. E. 348, 349.

Ward v. *Flood*, 48 Calif. 36, 49-51.

People ex rel. King v. *Gallagher*, 93 N. Y. 438, 445-447, 455.

People ex rel. Cisco v. *School Board*, 161 N. Y. 598, 601.

State ex rel. Gumm v. *Albritton*, 98 Okla. 158, 224 Pac. 511, 513.

People ex rel. Dietz v. *Easton*, (N. Y.) 13 Abbott's Practice (N. S.) 159, 165.

United States v. *Buntin*, 10 Fed. 730, 735.

Puitt v. *Commissioner*, 94 N. C. 709, 718-719.

Social equality is not a legal question, and cannot be enforced by laws or the judgments of courts.

Plessy v. *Ferguson*, 163 U. S. 537, 551.

State ex rel. Weaver v. *Trustees of Ohio State University*, 126 Ohio St. 290, 297.

People ex rel. King v. *Gallagher*, 93 N. Y. 438, 448.

Lehew v. *Brummell*, 103 Mo. 546, 551-2.

Younger v. *Judah*, 111 Mo. 303, 311-312.

Martin v. *Board of Education*, (W. Va.) 26 S. E. 348, 349.

Roberts v. *City of Boston*, 5 Cush. 198, 210.

Ward v. *Flood*, 48 Calif. 36.

III.

The facilities for legal education provided for petitioner under the Lincoln University Act (Secs. 9616-9624, R. S. Mo., 1929) are substantially equal to the facilities afforded white students in the School of Law of the University of Missouri.

In separating the races and in determining the particular facilities to be used by each race, the state is allowed a large measure of discretion; and the courts will not interfere with the exercise of that discretion as unconstitutional, except in case of a very clear and unmistakable disregard of constitutional rights.

Plessy v. *Ferguson*, 163 U. S. 537, 550.
Cumming v. *Board of Education*, 175 U. S. 528, 545.
Gong Lum v. *Rice*, 275 U. S. 78, 87.
Lowery v. *Board of Trustees*, 140 N. C. 33, 52 S. E. 267, 270.
Ward v. *Flood*, 48 Calif. 36, 54-56.
State ex rel. v. *McCann*, 21 Ohio 198, 204-5, 211-12.
People ex rel. King v. *Gallagher*, 93 N. Y. 438, 456.
People ex rel. Dietz v. *Easton*, (N. Y.) 13 Abbott's Practice (N. S.) 159, 161-163.
State ex rel. v. *Gray*, 93 Ind. 303, 306.

The Lincoln University Act (Secs. 9616-9624, R. S. Mo., 1929) provides higher education for the negroes of Missouri "up to the standard furnished at the State University of Missouri"; and provides that pending the full development of Lincoln University, its board of curators shall arrange for the attendance of negro residents of the state at the university of any adjacent state, to take any course of study provided for at the State University of Missouri and which is not taught at Lincoln University, and to pay the full tuition fees for such attendance. The duty to do these things is mandatory.

Lincoln University v. *Hackman*, 295 Mo. 118, 124.
State ex rel. Gaines v. *Canada* (R. 219, 221).

Under this act the duty to provide petitioner with a legal education is upon the curators of Lincoln University, and not upon the curators of the University of Missouri. It is the duty of the Lincoln University curators, upon petitioner's request, to establish a school of law in Lincoln University and to admit petitioner as a student therein; and, pending the inauguration of that school, and as a temporary matter, to arrange for his attendance

in one or another of the schools of law already established in the universities of any one of four adjacent states (all of which admit negroes), and to pay his tuition fees in full while he is attending such school.

Substantial equality and not identity of school facilities is what is guaranteed by the Fourteenth Amendment; and the Lincoln University Act provides substantially equal facilities for petitioner.

Gong Lum v. *Rice*, 275 U. S. 78, 84, 85-86, 87.

Lehew v. *Brummell*, 103 Mo. 546, 552.

People ex rel. King v. *Gallagher*, 93 N. Y. 438, 452, 448.

State ex rel. Garnes v. *McCann*, 21 Ohio St. 198, 211.

State ex rel. Weaver v. *Trustees of Ohio State University*, 126 Ohio St. 290, 297.

Wong Him v. *Callahan*, 119 Fed. 381, 382.

Cory v. *Carter*, 48 Ind. 327, 362, 363.

Ward v. *Flood*, 48 Calif. 36, 54, 56.

School Dist. v. *Hunnicutt*, 51 F. (2d) 528.

State ex rel. Gumm v. *Albritton*, 98 Okla. 158, 224 Pac. 511, 513.

Lowery v. *Board of Trustees*, 140 N. C. 33, 52 S. E. 267.

Dameron v. *Bayliss*, (Ariz.) 126 Pac. 273, 275.

Daviess County Board of Educ. v. *Johnson*, (Ky.) 200 S. W. 313, 315.

State ex rel. v. *Board of Education*, 7 Ohio Dec. 129.

State ex rel. Dietz v. *Easton*, (N. Y.) 13 Abbott's Practice (N. S.) 159, 161-162, 165.

United States v. *Buntin*, 10 Fed. 730, 735-6.

State ex rel. v. *Gray*, 93 Ind. 303, 306.

People ex rel. Cisco v. *School Board*, 161 N. Y. 598, 48 L. R. A. 113.

Lincoln University is able, financially and otherwise, to furnish petitioner with the legal education he seeks.

The quality of legal education available to petitioner in any of the universities of adjacent states equals that provided in the School of Law in the University of Missouri.

Petitioner's living expenses while attending law school would be the same whether he attended Lincoln University, the University of Missouri, or any of the state universities of Illinois, Iowa, Nebraska or Kansas (R. 220).

The small difference in travel expense incident to his attendance in any one of the four law schools in adjacent states is a mere matter of inconvenience, which must necessarily arise as an incident to any classification of school system; and furnishes no ground of complaint.

Lehew v. *Brummell,* 103 Mo. 546, 552.

People ex rel. King v. *Gallagher,* 93 N. Y. 438, 451-452.

Gong Lum v. *Rice,* 275 U. S. 78, 84.

Roberts v. *City of Boston,* (Mass.) 5 Cush. 198, 209-210.

State ex rel. Garnes v. *McCann,* 21 Ohio St. 109, 204, 211.

Cory v. *Carter,* 48 Ind. 327, 360-361.

Ward v. *Flood,* 48 Calif. 36, 42, 52-56.

Dameron v. *Bayliss,* (Ariz.) 126 Pac. 273, 274.

State ex rel. v. *Board of Education,* 7 Ohio Dec. 129.

People ex rel. Dietz v. *Easton,* (N. Y.) 13 Abbott's Practice (N. S.) 159, 161-162, 165.

United States v. *Buntin,* 10 Fed. 730, 735-6.

Any small difference in travel expense would be more than overcome by the payment by the state of his full tuition fees (Sec. 9622, R. S. Mo., 1929; R. 221-222).

Petitioner has refused to use the school facilities provided for him by the State of Missouri; and his refusal is an insuperable obstacle to his recovery.

McCabe v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 162-164.

The question as to the constitutionality of the statutory provision for out-of-state instruction is, strictly speaking, not here for review. This because petitioner never made application to the Lincoln University curators for the establishment of a law school; and it is impossible to know whether, if he had applied, a law course would have been immediately established there. Only if Lincoln University had refused or delayed establishment of a law school would the question of the constitutionality of out-of-state instruction arise.

McCabe v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S 151, 162-164.

IV.

The proof offered both by petitioner and by respondents established the fact, and the state Supreme Court expressly found, that the state had afforded petitioner the equal protection of the laws, even though he was excluded from the University of Missouri. This renders immaterial any discussion of the burden of proof.

The burden of proof did not rest upon respondents, but upon petitioner; the settled state rule as to this purely procedural question is that in a mandamus suit the burden is upon the relator to prove that he has a clear legal right to the relief sought; and this burden continues with him throughout.

State ex rel. Jacobsmeyer v. *Thatcher*, 338 Mo. 622.

State ex rel. Cranfill v. *Smith*, 330 Mo. 252.
State ex rel. Burnett v. *School District of the City of Jefferson*, 335 Mo. 803, 812-813.
State ex rel. Buckley v. *Thompson*, 323 Mo. 248.
Ex parte Ashcraft, 193 Mo. App. 486.

Petitioner's attack upon the credibility of witnesses is entirely unfair, and in each instance is not supported by the record.

Apart from that, petitioner is attacking the credibility of witnesses whom he himself produced, and for whose credibility he vouched.

Dunn v. *Dunnaker*, 87 Mo. 597.
Cooper v. *Armour & Co.*, 222 Mo. App. 1176.
Choctaw & M. R. Co. v. *Newton*, (8 C. C. A.) 140 Fed. 225.

V.

Mandamus against respondents was not a proper remedy, because petitioner must exhaust his administrative remedies before seeking extraordinary relief; and this he failed to do.

National Gas Pipe Line Co. of America v. *Slattery*, 58 Sup. Ct. Rep. 199, 204.
Goldsmith v. *United States Board of Tax Appeals*, 270 U. S. 117, 123.
Porter v. *Investors' Syndicate*, 286 U. S. 461.
Peterson Baking Co. v. *Bryan*, 290 U. S. 570, 575.
Ex parte Virginia Commissioners, 112 U. S. 177.

ARGUMENT.

I.

This case does not present a substantial federal question reviewable by this court.

The Supreme Court of Missouri has ruled against petitioner upon two principal propositions, neither of which involves a substantial federal question.

First. The court has held that the laws of Missouri do not entitle the petitioner to be admitted as a student in the University of Missouri, and has held that those laws provide for the separation of the white and negro races for the purpose of higher education (R. 211-216). This construction of the laws of Missouri by the highest court of that state is binding upon this court (*Senn* v. *Tile Layers' Protective Union*, 301 U. S. 468, 477; *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109, 113; *Atchison, Topeka & Santa Fe Railway Co.* v. *Railroad Commission of California*, 283 U. S. 380, 390-1; *Coombes* v. *Getz*, 285 U. S. 434, 441; *Memphis & C. Ry. Co.* v. *Pace*, 282 U. S. 241, 244; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 480; *Roe* v. *State of Kansas ex rel. Smith*, 278 U. S. 191, 193; *Ex Parte Worcester County National Bank*, 279 U. S. 347, 359; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 680; *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494, 509; *Dorchy* v. *State of Kansas*, 272 U. S. 306, 308; *Swiss Oil Corporation* v. *Shanks*, 273 U. S. 407, 411-412; *State of Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40, 41; *Keith* v. *Johnson*, 271 U. S. 1, 8; *Wadley Southern Ry. Co.* v. *State of Georgia*, 235 U. S. 651, 657-8). Clearly there is no federal question in this part of the state court's decision.

Second. The Supreme Court of Missouri, h'ding that petitioner is entitled to educational facilities substantially equal to those afforded white citizens (R. 218), has found as a fact that by the facilities for legal education available to petitioner (through the establishment of a law school in Lincoln University if he should ask for it, and, pending that, through out-of-state instruction), petitioner was given the opportunity to receive a legal education equal to that accorded to white students in the University of Missouri (R. 218-224). That court further found as a fact that the facilities available to petitioner through out-of-state instruction, pending the establishment of a law school in Lincoln University, were substantially identical with those offered white students in the University of Missouri, and would have given petitioner, as a prospective Missouri lawyer, as sound, comprehensive and valuable a legal education as is offered white students in the University of Missouri (R. 218-224). These findings of fact (which are not challenged by petitioner) are based upon substantial and uncontradicted evidence showing in much detail the courses offered, the casebooks used, the character, scope and quality of the instruction offered, the relative standing of the schools of law available to petitioner, in comparison with the facilities offered in the University of Missouri and the standing of its school of law (R. 109, 113, 114, 117-118, 157-8, 158-9, 160, 161, 162-3).

It is the settled rule of this court that on certiorari to review a decision of the highest court of a state, this court is bound by the state court's finding as to the facts, unless the petitioner contends and can show that the finding is without evidence to support it, or unless a conclusion of law as to a federal right and the finding of fact are so intermingled as to make it necessary, in order to

pass upon the federal question, to analyze the facts (*Northern Pacific Railway Co.* v. *North Dakota*, 236 U. S. 585, 593; *Thomas* v. *Texas*, 212 U. S. 278, 281; *Grayson* v. *Harris*, 267 U. S. 352, 357; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 393-4; *Waters-Pierce Co.* v. *Texas Company*, 212 U. S. 88, 97; *Willoughby* v. *Chicago*, 235 U. S. 45, 50; *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 567). Petitioner makes no claim in his petition or brief that the case at bar falls within either of these two exceptions to the general rule.

Petitioner at page 11 of his brief cites decisions by this court holding that where a federal right is denied, "it is the province of this court to ascertain whether the conclusion of the state court has adequate support in the evidence." That is undoubtedly true "where a federal right has been denied as the result of a finding of fact *which it is contended there was no evidence whatever to support*" (*Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261). But petitioner in the instant case does not, and truthfully cannot, claim that the finding of the state court is unsupported by the evidence; therefore the rule he invokes has no application.

None of the other cases cited on this question at page 11 of petitioner's brief in any manner contradicts what we have said above.

So it appears clear that neither of the two parts of the decision by the Supreme Court of Missouri involves a federal question reviewable by this court. The first part of the decision involves merely a construction of state laws. The second part of the decision, fully recognizing petitioner's constitutional right to equal facilities for legal education, finds as a fact that the State has accorded him equal facilities—which finding of fact, supported as it is by strong and uncontradicted evidence, is binding upon this

court. The absence of a substantial federal question is manifest.

If the state Supreme Court had denied that the equal protection clause of the Fourteenth Amendment entitles petitioner to substantially equal facilities for legal education, a wholly different question would have arisen. It could then have been argued with reason by petitioner that a constitutional right or privilege claimed by him under the equal protection clause had been denied. But that situation does not exist. The state Supreme Court held that "there is no question but what negro citizens and taxpayers of Missouri are entitled to school advantages substantially equal to those furnished white citizens of the state" (R. 218). Affirming this principle without equivocation, the court found as a fact that petitioner had been accorded substantially equal opportunity and facilities (R. 218-222).

Independently of the foregoing, there is an insuperable obstacle to petitioner's recovery, in this: Petitioner concededly refused to avail himself of the educational facilities for a legal education provided for him by the State of Missouri. Specifically, he refused to avail himself of his rights under the Lincoln University Act (R. 218-219, 222, 74, 82, 83, 84). If he had applied to the Lincoln University curators for a legal education, it is to be presumed that they would have given it to him in accordance with their mandatory duty under the act. His refusal to avail himself of his legal rights is fatal to his case.

In *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 163-4, five negroes sued to restrain the railway companies from making any distinction in sleeping and dining car service on account of race. The negroes' right to equal facilities was conceded

(pages 161-2), but recovery was denied for reasons stated by the court as follows (pages 163-4):

> "It is not alleged that any one of the complainants has ever traveled on any one of the five railroads, or has ever *requested* transportation on any of them; or that any one of the complainants has ever *requested* that accommodations be furnished to him in any sleeping cars, dining cars or chair cars; or that any of these five companies has ever notified any one of these complainants that such accommodations would not be furnished to him, when furnished to others, upon *reasonable request* and payment of the customary charge. Nor is there anything to show that *in case any of these complainants offers himself* as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, he will not have an adequate remedy at law. The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient grounds for injunction and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed."*

This case clearly does not fall within Paragraph 5 of Rule 38 of this court, defining the character of reasons which will be considered by this court in determining whether it will grant certiorari to review state court decisions. This, because (a) the Missouri Supreme Court's decision does not involve a substantial federal question; (b) the decision is in accord with applicable decisions of this court (*Plessy* v. *Ferguson*, 163 U. S. 537, 544; *Gong Lum* v. *Rice*, 275 U. S. 78,

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*All italics in quotations are ours.

85, 86; *Cumming* v. *Board of Education*, 175 U. S. 528; *Hall* v. *DeCuir*, (concurring opinion) 95 U. S. 485, 504-506); and (c) there is no showing of "special and important reasons" for the issuance of certiorari.

Petitioner attempts to make a showing of "special and important reasons" by claiming conflict between the decision in this case and the decision in *Pearson* v. *Murray*, 169 Md. 478, 182 Atl. 570, 103 A. L. R. 706. But the claimed conflict does not exist, for reasons clearly pointed out by the Missouri Supreme Court (R. 222-224).

Petitioner in effect asks this court to write a declaratory judgment for the purpose of "establishing a standard of conduct" in other states than Missouri. We cannot understand how the alleged need for the establishment of a standard of conduct in other states, where the facts and statutes are not the same, could afford any "special and important" reason for the issuance of certiorari in this Missouri case.

Petitioner says (page 4 of his Petition for Certiorari) that he "challenged the Lincoln University Act as a denial of his federal right to equal protection." This is not true. In his petition for mandamus (R. 2-11) petitioner did not attack the constitutionality of the Lincoln University Act.

For these reasons we respectfully submit that this case does not involve a substantial federal questior reviewable by this court.

II.

The State of Missouri has not denied petitioner the equal protection of the laws by excluding him from the School of Law of the University of Missouri.

It is, in effect, now conceded by petitioner that the laws of Missouri do not entitle a negro to admission as a

student in the University of Missouri, and that those laws provide for separation of the white and negro races for the purpose of higher education. The Missouri Supreme Court has so construed and applied the laws of that state (R. 211-216). That construction is controlling here (see cases cited under last previous section of this argument).

It must also be conceded by petitioner that separation of the white and negro races for purposes of education—the exclusion of members of each race from schools provided for the other race—does not infringe the rights of either race guaranteed by the Fourteenth Amendment. In *Plessy* v. *Ferguson*, 163 U. S. 537, 544, this court in speaking of race separation said:

> "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, *and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.* The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be *a valid exercise of the legislative power* even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."

In *Gong Lum* v. *Rice*, 275 U. S. 78, 85-86, this court said:

> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, *but we think that*

it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution" (citing many cases).

To the same effect see the concurring opinion in *Hall* v. *DeCuir*, 95 U. S. 485, 504-506.

In *Lehew* v. *Brummell*, 103 Mo. 546, 551-552, a leading case, cited with approval by this court in the *Plessy* and *Gong Lum Cases, supra*, the Missouri Supreme Court said:

"But it will be said the classification now in question is one based on color, and so it is; but the color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage."

* * * * * * *

"*The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right.* As said in the case just cited, 'Equality and not identity of privileges and rights is what is guaranteed to the citizen.' Our conclusion is that *the constitution and laws of this state providing for separate schools for colored children are not forbidden by, or in conflict with, the Fourteenth Amendment of the Federal Constitution;* and the courts of last resort in several states have reached the same result" (citing cases).

To the same effect are the following decisions:

Younger v. *Judah*, 111 Mo. 303, 310;

Bertonneau v. *Board of Directors*, 3 Fed. Cases 294, 296.

Wall v. *Oyster*, 36 App. D. C. 50, 31 L. R. A. (N. S.) 180, 185.

State ex rel. v. *McCann*, 21 Ohio 198, 209-211.

McMillan v. *School Committee*, 107 N. C. 609, 12 S. E. 330, 331.

Lowery v. *Board of Trustees*, 140 N. C. 33, 52 S. E. 267, 272.

Johnson v. *Board of Education*, 166 N. C. 468, 82 S. E. 832, 834, 835.

Martin v. *Board of Education*, (W. Va.) 26 S. E. 348, 349.

Ward v. *Flood*, 48 Calif. 36, 49-51.

People ex rel. King v. *Gallagher*, 93 N. Y. 438, 445-447, 455.

People ex rel. Cisco v. *School Board*, 161 N. Y. 598, 601.

State ex rel. Gumm v. *Albritton*, 98 Okla. 158, 224 Pac. 511, 513.

People ex rel. Dietz v. *Easton*, (N. Y.) 13 Abbott's Practice (N. S.) 159, 165.

United States v. *Buntin*, 10 Fed. 730, 735.

Puitt v. *Commissioners*, 94 N. C. 709, 718-719.

SOCIAL EQUALITY IS NOT A LEGAL QUESTION.

Petitioner's true attitude is quite clearly shown by the fact that in a deposition taken before trial he was asked whether, if a good law school were established at Lincoln University on a par with the one at the University of Missouri, he would attend it; and on the advice of counsel he refused to answer this entirely reasonable question (R. 88-89). This leads to the reasonable inference that what petitioner really wants is not equal

educational facilities so much as *social equality*. This may be inferred also from petitioner's brief wherein he advances an argument which, in substance and effect, is an argument for social equality of the races. With regard to this point it is sufficient to say that it is uniformly held by the courts in dealing with the question of race separation, that *social equality is not a legal question* and cannot be settled by law or by the judgments of courts.

In *Plessy* v. *Ferguson*, 163 U. S. 537, 551, this court said:

> "The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality it must be the result of natural affinities, mutual appreciation of each other's merits, and a voluntary consent of individuals."

In *State ex rel. Weaver* v. *Trustees of Ohio State University*, 126 Ohio St. 290, 297, the court said:

> "The relief that the relator seeks in this suit is such as to compel the respondents to grant her, not equal school advantages, but the same social intercourse. *The purely social relations of our citizens cannot be enforced by law;* nor were they intended to be regulated by our own laws, or by the state and federal constitutions" (citing many cases).

To the same effect are the following decisions:

People ex rel. King v. *Gallagher*, 93 N. Y. 438, 448.

Lehew v. *Brummell*, 103 Mo. 546, 551-2.

Younger v. *Judah*, 111 Mo. 303, 311-312.

Martin v. *Board of Education*, (W. Va.) 26 S. E. 348, 349.

Roberts v. *City of Boston*, 5 Cush. 198, 210.

Ward v. *Flood*, 48 Calif. 36.

III.

The facilities for legal education available to petitioner under the Lincoln University Act (Secs. 9616 to 9624, R. S. Mo., 1929) are substantially equal to the facilities afforded white students in the School of Law of the University of Missouri.

The State of Missouri has set up a complete and exclusive scheme and plan for the higher education of those qualified negroes who desire it. This plan affords the petitioner that equal opportunity which the Fourteenth Amendment guarantees. In separating the races, and in determining the particular facilities to be used by the two races, *the state is allowed a large measure of discretion; and the courts will not interfere with the exercise of that discretion as unconstitutional*, except in case of a very clear and unmistakable disregard of rights secured by the Constitution of the United States.

In *Plessy* v. *Ferguson*, 163 U. S. 537, 550, a statute of Louisiana requiring separate accommodations on railroad trains for the white and colored races, and forbidding any person to occupy a seat in coaches other than the ones assigned to the race to which he belonged, was held not in conflict with the Fourteenth Amendment. In the course of the opinion this court said:

> "So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation. *and with respect to this there must necessarily be a large discretion on the part of*

the legislature. In determining the question of reasonableness it is at liberty to act with reference to the *established usages, customs and traditions of the people,* and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

In *Cumming* v. *Board of Education,* 175 U. S. 528, 545, this court said:

"We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, *and any interference on the part of federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard* of rights secured by the supreme law of the land."

To the same effect is the decision in *Gong Lum* v. *Rice,* 275 U. S. 78, 87.

In *Lowery* v. *Board of Trustees,* 140 N. C. 33, 52 S. E. 267, 270, the North Carolina court in dealing with a case involving race separation for educational purposes said:

"This court would be reluctant to declare invalid an act establishing a public school, when it had received the sanction of the people directly and locally interested, unless it was manifest that these principles were violated. *Much must be left to the good faith, integrity and judgment of local boards in working out the difficult problems of providing equal facilities for each race* in the education of all the children of the state. Local conditions, relative numbers, and other well-recognized factors enter into the problem, and must be dealt with in a spirit of justice to all concerned, and to promote the honor and welfare of the state."

In *Ward* v. *Flood*, 48 Calif. 36, 54-56, a case dealing with the question of race separation for purposes of education, the California court applied the principle that a large discretion is vested in the school authorities, and in this connection quoted, with approval the following language from a Massachusetts case:

> "In the absence of special legislation on this subject, the law has vested the power in the committee to regulate the system of distribution and classification; and *when this power is reasonably exercised, without being abused or perverted by colorable pretences, the decision of the committee must be deemed conclusive.*"

The same principle is announced in the following decisions:

State ex rel. v. *McCann*, 21 Ohio 198, 204-5, 211-12.

People ex rel. King v. *Gallagher*, 93 N. Y. 438, 456.

People ex rel. Dietz v. *Easton*, (N. Y.) 13 Abbott's Practice (N. S.) 159, 161-163.

State ex rel. v. *Gray*, 93 Ind. 303, 306.

THE LINCOLN UNIVERSITY ACT.

The Lincoln University Act of 1921 (Secs. 9616 to 9624, R. S. Mo., 1929) provides higher education for the negroes of Missouri *"up to the standard furnished at the State University of Missouri."* The control of Lincoln University is vested in a board of curators consisting of the state superintendent of instruction and six other members, at least three of whom shall be negroes. The Lincoln University curators are required to organize after the manner of the board of curators of the state university, *with the same powers, authority, responsibilities,* privileges, immunities, liabilities and compensation as

those prescribed for the board of curators of the University of Missouri (Sec. 9621, R. S. Mo., 1929).

Section 9618 provides:

> "The board of curators of the Lincoln University *shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the State University of Missouri* whenever necessary and practicable in their opinion. To this end the board of curators shall be authorized to purchase necessary additional land, erect necessary additional buildings, to provide necessary additional equipment, and to locate, in the County of Cole, the respective units of the university where, in their opinion, the various schools will most effectively promote the purposes of this article."

The legislature, realizing that as a practical matter the full development of Lincoln University could not be accomplished instantaneously, and that *in the interim* negro students should be accorded the same opportunity for higher education as that accorded to white students at the University of Missouri, provided for this in a practical and eminently fair manner. Section 9622, R. S. Mo., 1929, provides:

> *"Pending the full development of the Lincoln University,* the board of curators shall have the authority to arrange for the attendance of negro residents of the State of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University and to pay the reasonable tuition fees for such attendance; provided that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department."

The duties imposed upon the Lincoln University curators by the Lincoln University Act (Secs. 9616 to 9624, R. S. Mo., 1929) have been held by the Missouri Supreme Court to be *mandatory*, to the end that the negroes of the State shall have an opportunity for university education equal to that afforded by the University of Missouri. In *Lincoln University* v. *Hackmann*, 295 Mo. 118, 124, the court said:

> "By the act in question a great educational institution was organized as a university separate and apart from the state university, for the purpose of affording the negroes of our state the means and facilities of higher education. The board of curators was clothed with the powers conferred by statute on the curators of our state university, and authorized to purchase land and erect additional buildings, etc. These duties are affected with a public trust. *The statute in this respect may be said to be mandatory in its nature* in order that its great beneficent purposes may be carried into effect and the state realize the benefits of *extending to the negroes of our state the education, culture and training afforded by the University of Missouri.*"

Under this controlling interpretation of the statute, reaffirmed in the instant case (R. 219, 221), the Lincoln University board of curators are not merely authorized, but are *required*, to reorganize the institution so that it shall afford opportunity to negroes equal to that accorded to white students. And, pending the full development of Lincoln University, the Lincoln University board of curators are not merely authorized, but are *required*, to arrange for the attendance of negro residents of the state at the university of any adjacent state, to take any course of study provided at the University of Missouri but not at Lincoln University; and they are not merely authorized, but are *required*, to pay the reasonable

tuition fees for such attendance (Sec. 9622, R. S. Mo., 1929). *The duty to do these things is mandatory and peremptory.*

At two different places in his brief (pages 2, 12) petitioner says the Lincoln University Act required Lincoln University to be reorganized so that it "*might*" afford negro citizens of the state opportunity for training equal to that afforded at the University of Missouri. This is an understatement; the statute uses the more positive words "*shall afford*" (Sec. 9618).

From the foregoing statutory provisions two conclusions irresistibly follow:

1. A complete and exclusive scheme and plan for the higher education of the negroes of the state has been formulated, and is in actual operation.

2. The responsibility and duty to carry out this scheme and plan has been placed by law—not upon these respondents, the curators of the *University of Missouri*—but upon the curators of *Lincoln University*.

The petitioner says he wants an education in the law. He is unquestionably entitled to it. The State of Missouri has made provision for him to receive such education, and has plainly marked out the course for him to pursue in order to get it. The agency of the state to whom he should (under the statute) apply is the agency specifically charged with the mandatory duty to furnish him what he seeks. It is the agency to whom the state has entrusted the authority and power, and upon whom the state has imposed the mandatory duty, to provide the negroes of the state with higher education. That agency is the board of curators of Lincoln University. It is not the present respondents, the board of curators of the University of Missouri.

Under this statutory scheme and plan, if and when petitioner pursues his legal rights and makes application to the Lincoln University curators for an education in the law, it will then become the mandatory duty of these curators (a) to establish a school of law in Lincoln University and to admit petitioner as a student therein; and (b) pending that, and as a temporary matter, to arrange for the attendance of petitioner in one or another of the schools of law already established in the Universities of Kansas, Nebraska, Iowa or Illinois (all of which admit negroes), and to pay his tuition fees while he is attending such school.

SUBSTANTIAL EQUALITY AND NOT IDENTITY OF SCHOOL FACILITIES IS WHAT IS GUARANTEED BY THE FOURTEENTH AMENDMENT.

The essential thing petitioner seeks is a legal education. The State of Missouri has provided that he shall have it. There is provided for him the opportunity, to be freely had for the asking, to receive through the curators of Lincoln University an education in the law, equal in all substantial respects to that provided in the Missouri University Law School.

Petitioner's whole case is based upon the erroneous assumption that he is constitutionally entitled to a legal education at a *particular place*, or in a *particular school*. This assumption is entirely unfounded. The Fourteenth Amendment no more gives petitioner the right to attend the University of Missouri than it gives a white student the right to attend Lincoln University. The equal protection clause of the Fourteenth Amendment goes no further than to require that the facilities for education afforded each race shall be substantially equal. The thing required is not that the facilities for negro students be *identical* (in the very same schools and class rooms), but that they shall be *substantially equal* to the facilities

offered to white students. The dec[illegible] in the instant case clearly recognizes and applies this principle (R. 218).

Petitioner contends (page 18 of Brief) that he is constitutionally entitled to what he is pleased to call the "diploma value" of an education in the University of Missouri. It is a naive conception of the value of an education, that its worth is to be attested by a "diploma" from a particular place. There is not a scintilla of evidence in this case that a legal education at the University of Missouri has a "diploma value." The evidence in this case overwhelmingly proves that the opportunity afforded to petitioner to receive a legal education was equal to that afforded to students at the University of Missouri (R. 218-224, 99, 100, 109, 113, 114, 117-118, 157-8, 158-9, 160, 161, 162-3).

Even if there were a "diploma value" in having attended the University of Missouri, no particular citizen of Missouri is entitled to the right to receive his opportunity for an education at *that particular place*. The State of Missouri may make reasonable regulations as to the system of education which it shall maintain for its citizens, and separation of the races is a reasonable incident to this regulation. Petitioner has received his college education at Lincoln University, and he admits that the opportunity thus afforded to him was fully as good as the opportunity afforded at the University of Missouri (R. 79-80, 80-81). The State of Missouri will furnish him a legal education at Lincoln University if he requests it; and when this equal opportunity has been provided for petitioner, there is no basis for a claim by him that this opportunity should have been afforded to him at another and different place. The State of Missouri cannot be required to afford equal opportunity for an education to each citizen *in the particular place* where each citizen thinks a tenuous "diploma value" exists.

The decision below (citing and following *Plessy v. Ferguson*, 163 U. S. 537, 544, and *Gong Lum v. Rice*, 275 U. S. 78, 84) holds that "equality and not identity of school advantages is what the law guarantees to every citizen, white or black" (R. 217-218). The court holds that the statutory provision made for the benefit of petitioner—(that he may receive a legal education in a school of law to be established in Lincoln University, and, pending that, in one or another of the schools of law already established in the universities of adjacent states)—gives petitioner substantially equal facilities for legal education, and satisfies the provisions of the equal protection clause of the Fourteenth Amendment.

In *Gong Lum* v. *Rice*, 275 U. S. 78, 84, a Chinese child nine years old, who lived in the Rosedale Consolidated High School District, Bolivar County, Mississippi, was by the school authorities refused the right to attend the school provided for white children in that district. It was not denied that a school for colored children *located in another district* was open to her. This court held that the Chinese child was not denied the equal protection of the laws by being classed among the colored races assigned to such separate school in the *outside district*. In that connection this court said:

> "We must assume then that there are school districts for colored children in Bolivar County, but that no colored school is within the limits of the Rosedale Consolidated High School District. This is not inconsistent with there being, *at a place outside of that district and in a different district*, a colored school which the plaintiff, Martha Lum, may conveniently attend. If so, she is not denied, under the existing school system, the right to attend and enjoy the privileges of a common school education in a colored school."

At pages 85-86 the court said:

> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution."

At page 87 the court said:

> "The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment. The judgment of the Supreme Court of Mississippi is affirmed."

We respectfully submit that the Gong Lum case is decisive here. Petitioner contends (page 11 of Brief) that that case leaves the question of equal protection "open for consideration by the court where an express claim is made that petitioner has been excluded from the only public institution available, solely because of race or color." In fact what this court said was this (page 84):

> "Had the petition alleged specifically that there was no colored school in Martha Lum's neighborhood *to which she could conveniently go*, a different question would have been presented, and this, without regard to the state Supreme Court's construction of the state constitution as limiting the white schools provided for the education of children of the white or Caucasian race."

If the availability of a colored school in an outside district afforded substantially equal facilities to *a nine-year-old child*, we submit that the provision in the Missouri statute for the establishment of a law school for petitioner in Lincoln University, and, pending that, provision for his attendance, with full tuition paid, at any one of four excellent law schools located in adjacent states, only 174, 299, 319 or 468 miles away from his home (R. 152), certainly afforded substantially equal facilities to petitioner, *a mature man* (R. 57). In the Gong Lum case the nine-year-old child would have had to go to and from the school in the outside district *every school day*, while petitioner would have had to travel to and from law school (whether at Lincoln University or out-of-state) *only two or three times a year;* so that the inconvenience in the facilities provided for petitioner was actually much less than the inconvenience in the facilities provided for the nine-year-old Chinese child in the Gong Lum case.

In *Lehew* v. *Brummell*, 103 Mo. 546, 552, suit was brought to enjoin the children of Brummell, a negro, from attending a white school located in the district where the negro children resided. Brummell's children were the only colored children of school age residing in that district. There was no colored school in that district. There was a colored school located in *another district*, but it was located at a greater distance from Brummell's home than was the white school. There was squarely presented for decision the question as to the constitutionality of the laws of Missouri, which provide for the education of colored children in *separate schools* located in a *different district* from that in which the colored children reside. The court held that these laws do not violate the equal protection clause of the Fourteenth Amendment. The court said:

"The fact must be kept in mind, for it lies at the foundation of this controversy, that the laws of this state do not exclude colored children from the public schools. Such children have all the school advantages and privileges that are afforded white children. The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right. As said in the case just cited, *'Equality and not identity of privileges and rights is what is guaranteed to the citizen.'* Our conclusion is that the constitution and laws of this state providing for separate schools for colored children are not forbidden by, or in conflict with, the Fourteenth Amendment of the Federal Constitution; and the courts of last resort in several states have reached the same result."

In *People ex rel. King* v. *Gallagher*, 93 N. Y. 438, a colored girl brought suit in mandamus to compel the principal of a white school to admit her as a student. A separate school was provided by the school authorities for colored persons, in accordance with statutory provisions. The colored school was located *at a greater distance* from the relator's residence than was the white school; but the court held that this was a mere incident to any classification of pupils, and that it afforded no substantial ground of complaint. At page 452 of the opinion the court said:

"It is quite impracticable for the authorities to take into account and provide for the gratification of the taste, or even the *convenience* of the individual citizen in respect to the place or conditions under which he shall receive an education. In the nature of things one pupil must always travel further to reach a fixed place of instruction than another, and so too the resident of one district is frequently required to go further to reach the school established

in his own district than a school in an adjoining district, but these are inconveniences incident to any system, and cannot be avoided. It is only when he can show that he is deprived of some substantial right which is accorded to other citizens and denied to him that he can successfully claim that his legal rights have been invaded."

At page 448 of the opinion the court said:

"When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized and performed all of the functions respecting social advantages with which it is endowed. The design of the common-school system of this State is to instruct the citizen, and where, for this purpose, they have placed *within his reach* equal means of acquiring an education with other persons, they have discharged their duty to him and he has received all that he is entitled to ask of the government with respect to such privileges."

In *State ex rel. Garnes* v. *McCann*, 21 Ohio St. 198, 211, the plaintiff, a colored man, sued in mandamus to compel the school authorities to admit his three children to the privileges of a white school, which was the only public school in subdistrict No. 9, where plaintiff resided. The township board had formed a joint district composed of Subdistrict 9 and an adjoining district and established a school in the joint district for the education of colored children, which afforded facilities equal to those of the white school in subdistrict No. 9. The plaintiff attacked this arrangement as a denial to him and his children of the equal protection of the laws, in violation of the Fourteenth Amendment. The Ohio court refused mandamus, and held:

"The plaintiff, then, cannot claim that his privileges are abridged on the ground of inequality of school advantages for his children. Nor can he dictate where his children shall be instructed, or what teacher shall perform that office, without obtaining privileges not enjoyed by white citizens. *Equality of rights does not involve the necessity of educating white and colored persons in the same school,* any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. *Any classification which preserves substantially equal school advantages is not prohibited by either the state or Federal Constitution, nor would it contravene the privileges of either.* There is, then, no ground upon which the plaintiff can claim that his rights under the Fourteenth Amendment have been infringed."

In *State ex rel. Weaver* v. *Trustees of Ohio State University,* 126 Ohio St. 290, the relator, Doris Weaver, sued in mandamus to compel the university authorities to admit her to a certain course in home economics and to residence in the "home management house" as the same was usually conducted. The relator was a colored girl and a senior student in the school of home economics. As a part of this course the students resided for a certain period in the "home management house" and carried the responsibility of homemaking under conditions approximating those of a modern home. The relator was denied admission to this home management house because "it has never been the policy of the Ohio State University to require students of different races or nationalities to reside together as part of a single family." The relator was the only girl of her race who had matriculated and become qualified to take the course; and by reason thereof the defendants had prepared quarters for relator, having the

same facilities as were furnished to students of the white race enrolled for such course of study. The Ohio court held that this arrangement did not infringe relator's constitutional right to the equal protection of the laws, and constituted no violation of the Fourteenth Amendment, and in this connection said (l. c. 297):

> "The relator has been denied no educational advantages or privileges that are not similarly used and enjoyed by other students; nor has she been denied the privilege of taking her degree, should she consent to occupy available space in the home economics house. On page 211, in the Ohio case, *Garnes* v. *McCann, supra*, the learned judge said, 'Any classification which preserves *substantially equal school advantages* is not prohibited by either the state or Federal Constitution, nor would it contravene the privileges of either.'"

In *Wong Him* v. *Callahan*, 119 Fed. 381, 382, the complainant, a Chinese citizen of the United States, brought suit to compel the school authorities to admit him into a white school. A statute of California provided separate schools for Chinese. The question was presented whether complainant's rights under the equal protection clause of the Fourteenth Amendment were infringed. The court said:

> "Concerning the authority of the state over matters pertaining to public schools within its limits, and the validity of legislation of the character of that under consideration, it is well settled that the state has the right to provide separate schools for the children of different races, and such action is not forbidden by the Fourteenth Amendment to the Constitution, provided the schools so established make no discrimination in the educational facilities which they afford. *When the schools are conducted under the same general rules, and the course of study is the*

same in one school as in the other, it cannot be said that pupils in either are deprived of the equal protection of the law in the matter of receiving an education."

Other decisions upholding the constitutionality of provisions for separate education of the races, similar to those involved in the case at bar, are the following:

Cory v. *Carter*, 48 Ind. 327, 362, 363.

Ward v. *Flood*, 48 Calif. 36, 54, 56.

School Dist. v. *Hunnicutt*, 51 F. (2d) 528.

State ex rel. Gumm v. *Albritton*, 98 Okla. 158, 224 Pac. 511, 513.

Lowery v. *Board of Trustees*, 140 N. C. 33, 52 S. E. 267.

Dameron v. *Bayliss*, (Ariz.) 126 Pac. 273, 275.

Daviess County Board of Educ. v. *Johnson*, (Ky.) 200 S. W. 313, 315.

State ex rel. v. *Board of Education*, 7 Ohio Dec. 129.

State ex rel. Dietz v. *Easton*, (N. Y.) 13 Abbott's Practice (N. S.) 159, 161-162, 165.

United States v. *Buntin*, 10 Fed. 730, 735-6.

State ex rel. v. *Gray*, 93 Ind. 303, 306.

People ex rel. Cisco v. *School Board*, [redacted] N. Y. 598, 48 L. R. A. 113.

LINCOLN UNIVERSITY'S ABILITY TO FURNISH PETITIONER A LEGAL EDUCATION.

In his brief petitioner contemptuously refers to the Lincoln University Act as, in effect, mere camouflage not backed up by anything substantial. *The implication is utterly false.* The State of Missouri is a pioneer in the field of higher education for negroes, and is the only state in the Union which has established a separate university for negroes on the same basis as the state university for white students (R. 138). The state legisla-

ture has always given Lincoln University substantially all the money requested by its board (R. 137), and from 1921 to 1935 appropriated $3,477,153.49, from which $500,000.00 was eliminated by the decision in *Lincoln University* v. *Hackmann*, 295 Mo. 118, leaving *the net balance appropriated in those years $2,977,153.49* (R. 149-150). The State of Missouri has dealt generously in providing for the higher education of the negro.

Petitioner says in his brief (page 13) that Lincoln University has no definite program of expansion. This is a misleading statement. In fact, the president of its board testified as follows (R. 130):

> "At the present time we are making a very careful survey of negro education in Missouri to determine what Lincoln University should do for its people, that it is not now doing; *and on the basis of that we shall formulate a definite program of expansion.*"

Petitioner says in his brief (page 13) that Lincoln University was facing the prospect of ending up the biennium with a small deficit. In fact, this was a deficit of only $3,000.00, not in the fund for general operation, but in a special building fund, due to unexpected labor trouble in the erection of a building (R. 135, 136). Petitioner ignores the fact that at the time he applied for admission in the University of Missouri, the unexpended balances in the Lincoln University funds aggregated *$311,061.74*, a substantial part of which funds were available for *operation* and *general expense* (R. 147, and see Laws Mo., 1935, page 66), and that if petitioner had applied for a legal education under the Lincoln University Act, the funds were therefore ample to have covered his needs. In speaking of the institution winding up with a

small deficit at the end of the biennium, relator is stressing a fact which is immaterial. Many state institutions wind up with small deficits at the end of a biennial period, yet they continue to function as going concerns nevertheless. Indeed, the United States Government for seven or eight years past has wound up each year with a very substantial deficit, yet it is still a going concern and its bonds command a premium in the financial markets of the world.

Petitioner argues that Lincoln University has not so far included a law department. *But there has never been any demand upon Lincoln University for a legal education by any negro* (R. 222, 136-137). The petitioner himself has never made any such demand (R. 222, 218-219, 85-86, 136-137). So there is good reason for not having established a school of law up to this time. As indicating the good faith of the state and of the Lincoln University curators, the facts are that prior to the institution of this suit the Lincoln University curators were making a complete survey of the whole subject of negro education, on the basis of which a definite program of expansion was planned (R. 130). The history of the development of Lincoln University, from a modest beginning to what is now one of the leading negro universities in the nation, is cogent evidence that the State of Missouri has generously responded to its full responsibility for the higher education of the negro race. The Lincoln University Act has imposed upon the Lincoln University curators the mandatory duty to establish a school of law in Lincoln University when the need for it exists. In the light of past expansion of the institution to meet the growing needs of the negro in the field of higher education, it is to be reasonably presumed that the state will, in good faith, continue to fulfill its obligation.

It ill becomes petitioner to complain of the absence of a law department in Lincoln University, when he admits that he never informed anyone connected with Lincoln University that he ever desired a legal education. When he was advised of his right to apply to that institution, he chose to ignore the rights which the State of Missouri had afforded him, and voluntarily followed a course of action which can accomplish no other result than merely to delay his legal education (R. 74, 82, 83, 84, 218-219).

Petitioner in his brief (pages 22-23) in effect argues that a request that the Lincoln University curators furnish him with a legal education would have been a vain and useless thing. *There is nothing in this record justifying any such suggestion.* If on the date when petitioner applied for admission into the University of Missouri petitioner had instead applied to the Lincoln University curators, it would have been the duty of those curators (and the law presumes they would have performed the duty) to establish a law school in Lincoln University, and, pending that, to arrange for petitioner's attendance in the law school of any one of four adjacent state universities which he might select, and to pay his tuition fees while so attending such law school. Moreover, on that very date, as above pointed out, Lincoln University had on hand in unexpended funds $311,061.74 (R. 147). The undisputed evidence shows that a law school in Lincoln University could be established and operated, on a level of scholarship and training equal to that at the University of Missouri, for a maximum of $10,000.00 per year (R. 185-186). And on the very day petitioner applied for admission in the University of Missouri there was in the special tuition fund, in charge of the state superintendent of schools, the additional sum of $6,351.18 available for payment of out-of-state tuitions

for negroes (R. 220-221, 165). These undisputed facts, shown by this record, utterly destroy petitioner's contention that a demand on the Lincoln University curators would have been useless.

Petitioner argues in his brief (page 23) that no means were available to open a law school in Lincoln University. This statement is unsupported by the record. Petitioner ignores the fact that in 1935—although it would cost a maximum of only $10,000.00 per year to establish and maintain a law department in Lincoln University (R. 185-186)—$212,000.00 was appropriated for *salaries* of executive officials, *professors and instructors*, etc., and $80,000.00 was appropriated for *operation* and *general expense* of Lincoln University (Laws Mo., 1935, page 66). Petitioner also ignores the fact that at the time he applied for admission as a student in the University of Missouri the unexpended balance in the former appropriation was $138,684.63, and the unexpended balance in the latter appropriation was $56,433.75 (R. 147). Obviously there was ample money available for the expansion of Lincoln University by the establishment of a law school, if the demand therefor had been made by petitioner.

This answers petitioner's statement (page 3 of Brief) that no appropriation has been made to enable Lincoln University to offer professional or graduate courses. The fact of the matter is that either of the above funds was available for that purpose, if there ever had been a demand for any professional or graduate course by any negro citizen of the state. The appropriations for salaries of professors and instructors were general in form, and were available for *law professors and instructors*, if needed (see appropriation acts copied in appendix).

The expansion of the teaching staff in Lincoln University is conclusively shown by the steady increase in the appropriations for salaries. The amounts appropriated for salaries from 1921 to 1935 were as follows (see appropriation acts copied in appendix):

1921	$ 80,000.00
1923	124,946.41
1925	154,000.00
1927	175,000.00
1929	180,000.00
1931	200,000.00
1933	200,000.00
1935	212,000.00

That marked expansion has occurred is obvious from the fact that salary appropriations have nearly tripled within fourteen years.

At page 13 of his brief petitioner says that "no serious argument was made at the trial that Lincoln University either could or would inaugurate a law course for the benefit of petitioner, the only applicant." This is a grossly erroneous statement, wholly unsupported by the record. By respondents' return to the alternative writ of mandamus they specifically alleged petitioner's duty to apply to the Lincoln University curators for a legal education if he desired it, alleged the duty of such curators to establish a law department in Lincoln University, and the availability of sufficient funds (R. 36-39).

While the record does not show the oral arguments at the trial, petitioner has no basis in fact for his assertion that the same point was not seriously pressed in argument—the true fact being that it was vigorously pressed. Petitioner also makes a misstatement when he refers to himself as "the only applicant" for a law course

in Lincoln University. The fact is that petitioner refused to become an applicant for such a course at Lincoln University (R. 218-219, 222, 74, 82, 83, 84).

While it is true, as petitioner says (pages 13-14 of Brief), that the Lincoln University officials in correspondence with petitioner referred him to the scholarship provisions of the Lincoln University Act (R. 72-73), this was obviously the appropriate thing for them to do, in view of the fact that when petitioner applied for admission to Missouri University (R. 62-63), the opening of the September semester at Lincoln University was almost at hand, leaving insufficient time to open a law school in that institution at that semester. In these circumstances it was the Lincoln University officials' duty to furnish petitioner out-of-state instruction until a law school in Lincoln University could be established (Sec. 9622, R. S. Mo., 1929). The fact that they did not thereafter establish a law school for petitioner was because no one, not even petitioner, ever requested legal instruction there; and in fact petitioner four days later definitely indicated his refusal to avail himself of any of his rights under the Lincoln University Act (R. 65-66, 67). It would have been futile for the curators of Lincoln University to have established a law school in that institution until at least one student had expressed a desire to receive legal instruction there.

As to money available for the payment of out-of-state tuitions. The Lincoln University Act provided that the Lincoln University curators should pay the tuition fees; and it was this statute which established the right of relator to *full tuition* (Sec. 9622, R. S. Mo., 1929). Under the well-settled law the provisions of this *general act*, creating the right to *full* tuitions, could not be amended or affected by the terms of the subsequent *appropriation acts* (Laws Mo., 1929, p. 61; Laws Mo., 1931, p. 28; Laws

Mo., 1933, pp. 9, 87; Laws Mo., 1935, p. 113), the latter two of which purported to limit payment of tuition fees to the *difference* between the amounts respectively charged out of state and at the University of Missouri (*State ex rel. Davis* v. *Smith*, 335 Mo. 1069; *State ex rel. Hueller* v. *Thompson*, 316 Mo. 272; *State ex rel. Tolerton* v. *Gordon*, 236 Mo. 142). It therefore results, as the Missouri Supreme Court held (R. 221), that all of the money appropriated for tuition fees was available for the payment of full tuitions, in accordance with the provisions of the Lincoln University Act, *supra*. Petitioner's statement (page 13 of Brief) that "no money was appropriated for scholarships until 1929," is immaterial because petitioner was not ready to take a legal education until 1935 (R. 57-58).

Petitioner says in his brief (page 14) that only one negro law student could be found in the adjacent state universities, and only three negro lawyers had been admitted to the Missouri bar within the past five years—which inferentially suggests that petitioner is now for the first time contending that there are not enough Missouri negro residents desiring to study law to justify the expenditure of the money necessary to create a law department at Lincoln University. In making this contention, petitioner overlooks his own contention, vigorously presented below (R. 230), that petitioner's right to receive a legal education is "individual," and "cannot be made to depend on how many or how few negroes apply to the State for a legal education." It is the individual who is entitled to receive the equal protection of the laws, and if one qualified negro is denied the establishment of a law school by the Lincoln University curators, he may properly claim that his constitutional privilege has been invaded (*McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 160), and by mandamus

may compel those curators to establish a law school in that institution (*Cumming* v. *Richmond County Board of Education*, 175 U. S. 528, 545). In this connection the evidence shows that it would cost a maximum of $10,000.00 per year to maintain and establish such law school at Lincoln University (R. 185-186), and that the cost to the state would be equally great if petitioner were admitted as a student in the Missouri University Law School and taught in a class separately from white students (R. 186).

Petitioner says in his brief (page 13) that the out-of-state scholarships have been administered by the state superintendent of schools and not by the Lincoln University curators. While this is immaterial—petitioner never having applied to either of these state agencies for out-of-state tuition—we desire to correct the erroneous impression created by petitioner's half-true statement. Section 9622 was enacted in 1921, and required the Lincoln University curators "to pay the reasonable tuition fees" for the attendance of negro residents at the university of an adjacent state. The duty of the Lincoln University curators to pay the full tuitions was mandatory (R. 221-222, and see *Lincoln University* v. *Hackmann*, 295 Mo. 118, 124). When the General Assembly, supplementing the appropriations to Lincoln University, appropriated additional sums, aggregating $55,615.91, specifically for out-of-state tuition fees (Laws Mo., 1929, p. 61; Laws Mo., 1931, p. 28; Laws Mo., 1933, pp. 9, 87; Laws Mo., 1935, p. 113), the state superintendent of schools assumed the power to administer and disburse these special funds (R. 167-169). The net result is that there have been two state agencies charged with or exercising the duty of disbursing out-of-state tuition fees—the Lincoln University curators under Section 9622, and

the state superintendent of schools under the special appropriations acts. The superintendent of schools, incidentally, is *ex officio* a member of the Lincoln University board of curators (Sec. 9617, R. S. Mo., 1929).

Petitioner says (page 13) that the 1933 appropriation act reduced the scholarships from full tuition to the differential between the tuition at the out-of-state university and at the University of Missouri. This contention is fully answered by the state court's decision that the proviso limiting out-of-state tuition to the differential was "unconstitutional and void," and that petitioner was entitled, upon application, to full tuition (R. 221).

QUALITY OF LEGAL EDUCATION AVAILABLE IN THE UNIVERSITIES OF ADJACENT STATES EQUALS THAT IN THE SCHOOL OF LAW IN THE UNIVERSITY OF MISSOURI

Petitioner's own evidence shows that the legal education which petitioner, pending the establishment of a law school in Lincoln University, would receive in the law school at any one of the four adjacent state universities (Kansas, Nebraska, Iowa or Illinois) would be substantially identical with the education he would receive if admitted into the Law School of Missouri University (R. 219, 117-118). All of those law schools are of the highest standing, members of the Association of American Law Schools, and on the approved list of the American Bar Association (R. 219, 113). A student desiring to practice law in Missouri can get as sound, comprehensive and valuable legal education in any one of these four law schools as he could get in the University of Missouri Law School. Petitioner's own witness so testifies (R. 219, 117-118); there was no countervailing testimony and the Missouri Supreme Court so found (R. 219).

The Missouri Supreme Court found as a fact that the University of Missouri Law School does not specialize in Missouri law and procedure (R. 219). The evidence supporting this finding of fact is fully reviewed in our statement of the case (pages 6-7, *supra*), and it appears at pages 99, 100, 109, 111-113, 115, 116, 117, 118, 119 and 144-145 of the record.

In each of the four adjacent state university law schools, as in the University of Missouri Law School, the system of education is exactly the same, designed to give the student such fundamental education in the law as will enable him to practice law in any state where the Anglo-American system of law obtains (R. 219, 109). In all five schools the same system of instruction is used (R. 219, 109, 113); and the courses of study and the casebooks used are substantially identical (R. 219, 155-157, 158-159, 160, 161, 162-163). Students frequently transfer from one to another of these five schools, receiving full credit for the work done in the former school, and moving right along without any loss of time (R. 219, 114).

PETITIONER'S LIVING AND TRAVEL EXPENSES.

Petitioner lived in St. Louis, and necessarily would have had to pay his living expenses, whether he attended Lincoln University or the University of Missouri, Illinois, Iowa, Nebraska or Kansas (R. 220).

The mere fact that in order to avail himself of legal education in any one of the four law schools in adjacent states, the petitioner (a grown man) would be put to the necessity of traveling further from his home in St. Louis than the distance from St. Louis to Columbia (where the University of Missouri is located), is a mere matter of inconvenience, which must necessarily arise as an incident to any classification or any

school system; and the court below held that this furnishes no substantial ground of complaint by petitioner (R. 220).

In *Lehew* v. *Brummell*, 103 Mo. 546, 552, the court said:

> "The law does not undertake to establish a school within a given distance of anyone, white or black. *The inequality in distances to be traveled by the children of different families is but an incident to any classification, and furnishes no substantial ground of complaint. People ex rel. King* v. *Gallagher*, 93 N. Y. 438-451."

In *People ex rel. King* v. *Gallagher*, 93 N. Y. 438, 451-452, the New York court said:

> "The fact that by this system of classification one person is required to go further to reach his place of instruction than he otherwise would *is a mere incident to any classification of pupils in the public schools of a large city, and affords no substantial ground of complaint.* * * * In the nature of things one pupil must always travel further to reach a fixed place of instruction than another, and so too the resident of one district is frequently required to go further to reach the school established in his own district than a school in an adjoining district; *but these are inconveniences incident to any system, and cannot be avoided.*"

To the same effect are the following decisions:

Gong Lum v. *Rice*, 275 U. S. 78, 84.

Roberts v. *City of Boston*, (Mass.) 5 Cush. 198, 209-210.

State ex rel. Garnes v. *McCann*, 21 Ohio St. 109, 204, 211.

Cory v. *Carter*, 48 Ind. 327, 360-361.

Ward v. *Flood*, 48 Calif. 36, 42, 52-56.
Dameron v. *Bayliss*, (Ariz.) 126 Pac. 273, 274.
State ex rel. v. *Board of Education*, 7 Ohio Dec. 129.
People ex rel. Dietz v. *Easton*, (N. Y.) 13 Abbott's Practice (N. S.) 159, 161-162, 165.
United States v. *Buntin*, 10 Fed. 730, 735-6.

As a matter of fact, the petitioner's expense of travel to any of these adjacent state universities would be no greater than the traveling expense of students living in various parts of Missouri, who attend the University of Missouri at Columbia (R. 220, 90, 151-153). It would be no greater hardship on petitioner, a man now twenty-seven years of age, to travel from St. Louis to Champaign, Illinois, for example, than it would be for him to travel from St. Louis to Columbia, Missouri; or for a Missouri University student to travel from Caruthersville, Missouri, to Columbia, Missouri (R. 220, 152).

Even if petitioner's travel expense were slightly increased, this unavoidable disadvantage would be more than overcome by the fact that the Lincoln University curators would be required by law to pay the full amount of his tuition fees (Sec. 9622, R. S. Mo., 1929). These fees, for the first year of the law course, range in the four adjacent state universities from $109.75 to $178.00 (R. 220, 157-158, 159-160, 161, 162). In this respect he would enjoy temporarily a pecuniary advantage over white students attending the University of Missouri, who must pay tuition fees—which for the first year of the law course amount to $127.50 (R. 220, 154-155)—without reimbursement from the State. Petitioner therefore can make no reasonable complaint based on the fact that, temporarily and until the establishment of a law department in Lincoln University, he would be required to travel further

than the distance from St. Louis to Columbia, in order to avail himself of education in an adjacent state.

PETITIONER REFUSES TO USE THE SCHOOL FACILITIES PROVIDED FOR HIM BY THE STATE OF MISSOURI.

Although the State has made all reasonable provisions to afford petitioner the opportunity for legal education (Secs. 9618 and 9622, R. S. Mo., 1929), the petitioner has deliberately chosen not to avail himself of these provisions (R. 218-219). When he applied for admission to the University of Missouri, he was by the registrar referred to the president of Lincoln University (R. 65), who in turn wrote petitioner, calling his attention specifically to the provisions of the Lincoln University Act, and offering him aid thereunder (R. 72-73). Petitioner admits that he was thus fully advised of the provisions made for his benefit by the act, and he says that after full consideration he deliberately refused to avail himself of such rights (R. 74, 82, 83, 84). Instead of proceeding in a reasonable way, to take advantage of the rights provided for him by the state, we find him within 48 hours in consultation with the National Association for the Advancement of Colored People (R. 82, 84), whose counsel (his present counsel) advised him to refuse to avail himself of the rights provided by the Lincoln University Act, and to "keep on corresponding with Missouri University" (R. 84).

The record shows, and petitioner admits, that he has never made application to Lincoln University to give him what he seeks (R. 218-219, 222, 74, 82, 83, 84, 85-86). He refuses to apply to the state agency specifically charged with the mandatory duty to give him what he seeks; and instead attempts to force his way into the University of Missouri by mandamus. If he had availed himself of the rights he enjoys under the Lincoln University Act, and had seen fit to accept the opportunity offered to him

by the State of Missouri in *August, 1935*, he would by this time have completed his three-year law course.

Petitioner's refusal to avail himself of his rights under the Lincoln University Act is an "insuperable obstacle" to his recovery (*McCabe* v. *Atchison, Topeka & Santa Fe Railway Company*, 235 U. S. 151, 162-164).

AS TO PETITIONER'S ARGUMENT REGARDING A CONSTITUTIONAL MONEY EQUIVALENT FOR HIS ALLEGED RIGHT TO BE A STUDENT IN MISSOURI UNIVERSITY.

Petitioner argues in his brief (page 20) that if there could be a constitutional money equivalent for his alleged right to be a student in the School of Law of the University of Missouri, it would have to be the "*per capita* contribution which the state makes to the legal education of a white student figuring not only current expenditure but making a pro rata allowance for the capital investment in land, buildings and equipment as well—as, for example, the law building, the law library and other capital items." The fallacy in this argument is that no student has the right to demand a *per capita* expenditure by the state for his education, but his right ends when the state furnishes him educational facilities substantially equal to those furnished other citizens by the state. But even if, by any manner of reasoning, it could be established that petitioner would be entitled to receive this *per capita* expenditure, it would appear that the educational facilities here provided for his enjoyment not only render him equal *per capita* expenditure for educational facilities, but in addition provide for him the payment of out-of-state tuition fees, an advantage which the state does not accord to students in the Law School of the University of Missouri.

Petitioner overlooks the fact, a fact so well known that it is a matter of judicial knowledge, that in the

reciprocal practice of the different states of the Union in rendering educational facilities for higher educational training, they admit to their higher institutions of learning qualified students who may apply from any state. In other words, the University of Missouri, as this record shows, receives students from the State of Illinois, while Illinois University receives students from Missouri. The evidence shows that the facilities for legal education in the two states are of equal standing. By this reciprocal practice of receiving nonresident students, each state, including Missouri, spends sufficient capital to furnish substantially equal educational facilities to the students it receives. So that if petitioner should enter the Law School of the University of Illinois it could not truthfully be said that he was being educated at the expense of the State of Illinois, because to say this would overlook the fact that the State of Missouri furnishes like educational facilities to many residents of the State of Illinois. By this reciprocal practice between the higher institutions of learning of the various states, it so happens that a student attending any one of these recognized institutions of learning receives equal facilities for legal education. And it is by reason of the fact that this reciprocal practice exists that petitioner would certainly not be entitled to demand from the State of Missouri, in addition to payment of his tuition fees at Illinois University, the added *per capita* cost of educating white students at the Law School of the University of Missouri. If petitioner should enroll as a student in the Law School of the University of Illinois, and should receive from the State of Missouri (as he would) the tuition fees required for admission to that institution, he would receive that which a student at the Law School of the University of Missouri receives, to-wit, the opportunity of using substantially equal facilities for receiving a

sound legal education, and in addition he would also receive that which a resident Missouri student does not receive when entering the Law School of the University of Missouri, to-wit, his full tuition. Petitioner cannot justly ask for more than this.

In his brief petitioner attempts to belittle the provisions made by the State of Missouri for out-of-state tuitions, and he argues that these constitute no substantial equivalent for the legal education offered white residents in the Missouri University Law School. The State of Missouri does not merely offer petitioner out-of-state tuitions; the state offers him a legal education which is a substantial equivalent to the legal education offered white students in the University of Missouri Law School; and so far as tuitions are concerned, petitioner is actually given a pecuniary advantage over white students in the University of Missouri, in that pending the establishment of a school of law at Lincoln University the state pays his full tuition fees in the adjacent state university—an advantage which white students in the University of Missouri do not enjoy.

CONSTITUTIONALITY OF PROVISION FOR OUT-OF-STATE INSTRUCTION IS, STRICTLY SPEAKING, NOT HERE FOR REVIEW.

The question of the constitutionality of the provision for out-of-state instruction is, strictly speaking, not presented for review. This for the reason that petitioner never made any application to Lincoln University curators for the establishment of a law course in that institution; and, therefore, it is impossible to know whether the curators of Lincoln University, had he knocked at the door, would have *immediately established a law course there*, rendering it unnecessary

for him to go out-of-state for a legal education. It would only be in case he had applied there and they had refused or delayed establishment of a law school in that institution, that the question of the constitutionality of out-of-state instruction would arise (*McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.*, 235 U. S. 151, 163-4).

However, we do not want to be misunderstood as to our position on this point. We are firmly of the opinion that had petitioner applied for the establishment of a law school at Lincoln University, and the Lincoln University curators had offered to pay his tuition out-of-state for the short interval of time that might have elapsed while they were establishing a law course at Lincoln University, the necessity of his temporarily attending a law school of an adjacent state would not in any manner have impinged upon his constitutional rights. As we have demonstrated above, the legal education that he would have thus acquired is equal in all respects to the legal education afforded at the University of Missouri; and in addition to that he would have received the financial advantage of free tuition.

When we consider the modern means of transportation, of interconnecting state highways, bus lines, railroads and interurbans, it cannot be said that any condition which might require petitioner (a mature man, now 27 years old) to attend law school in an adjoining state for a short time, while Lincoln University was establishing a law course, would deprive him of any constitutional right. It is no different in legal significance from the situation mentioned in some of the cases which we have reviewed, where colored children have been sent outside their own district, or have been sent to a greater distance than they would have

had to go had they attended a white school. Under all the authorities this is nothing more than an inconvenience, and in no event does it infringe the student's constitutional right.

AUTHORITIES CITED BY PETITIONER.

The decision in *Pearson* v. *Murray*, 169 Md. 478, 182 Atl. 590, 103 A. L. R. 706, is distinguishable on grounds pointed out in the opinion below (R. 222-224).

The decision in *Gong Lum* v. *Rice*, 275 U. S. 78, 84, cited by petitioner, actually supports the decision below, and was quoted and followed by the opinion.

The decision in *Board of Education* v. *Board of Education*, 264 Ky. 245, 94 S. W. (2d) 687, cited by petitioner, does not in any manner discuss the legal proposition under which it is cited, and is not in point on any question involved in the instant case.

Petitioner cites 20 Minnesota Law Review, 673, 674, in which the writer says that "probably no foreign law school would offer training in the law of a state equal to that of its state university." This suggestion is completely answered by the evidence in this case, which shows without contradiction that the law school in the University of Missouri does not specialize in teaching Missouri law, and that the basis of instruction is the general common-law system prevailing throughout the United States; and a student desiring to practice in Missouri can get as sound, comprehensive and valuable legal education in the law schools of Kansas, Nebraska, Iowa and Illinois universities as in the University of Missouri (R. 219, 99, 100, 113, 116, 117, 118).

IV.

The proof offered both by petitioner and by respondents established the fact, and the state Supreme Court expressly found, that the state had afforded petitioner the equal protection of the laws, even though he was excluded from the University of Missouri.

Point III in petitioner's brief (pages 21-22) obviously has not even a remote bearing upon any federal question. In that point petitioner argues that respondents carried the burden of proof, a purely state question of procedure; and that officials of the University of Missouri (petitioner's own witnesses, for whose credibility he vouched) exhibited on the witness stand an "attitude of evasion and forgetfulness."

It would seem wholly unnecessary to answer such arguments in a proceeding such as this. This court on certiorari to review a state court decision is not concerned with local questions of procedure or with the credibility of witnesses. However, the answers to petitioner's arguments are clearly apparent from the record, and may be briefly presented.

1. The burden of proof did not rest upon respondents, but upon petitioner. The settled state rule as to this purely procedural question is that in a mandamus suit the burden is upon the relator to prove that he has a clear legal right to the relief sought; and this burden continues with the relator throughout (*State ex rel. Jacobsmeyer* v. *Thatcher*, 338 Mo. 622; *State ex rel. Cranfill* v. *Smith*, 330 Mo. 252; *State ex rel. Burnett* v. *School District of the City of Jefferson*, 335 Mo. 803, 812-813; *State ex rel. Buckley* v. *Thompson*, 323 Mo. 248; *Ex parte Ashcraft*, 193 Mo. App. 486).

Petitioner's discussion of the burden of proof is pointless. The opinion of the Missouri Supreme Court did not

(as it might properly have done) place the burden of proof upon petitioner—indeed, the opinion does not discuss the burden of proof at all. However, the opinion does fully state the essential facts (R. 210, 218-221, 222). These facts—proven largely by evidence offered by petitioner himself (R. 91, 119, 121, 128)—show that petitioner was accorded an opportunity for legal education substantially equivalent to that offered to white students in the University of Missouri School of Law. We respectfully submit, therefore, that any discussion of the question as to where the burden of proof rests is irrelevant and futile.

2. Petitioner's criticism of the University of Missouri officials as guilty of "evasion and forgetfulness" is unfair, as the record cited by petitioner demonstrates (R. 92-107, 122-123). As an illustration of the unfairness of this criticism, petitioner says (page 21 of his Brief) that Dean Masterson "could detail down to the last odd number the Missouri cases in the casebooks used in his school of law," but he "could not recall the policy of the Missouri Law Review." In point of fact, Dean Masterson did not purport to detail the number of Missouri cases in the casebooks; he merely identified tabulations which had been prepared, showing this information (R. 110-113). Moreover, Dean Masterson, instead of evading, testified frankly and in full detail regarding the policy of the Missouri Law Review (R. 100-106). Petitioner unfairly says that Dean Masterson testified that he could not "speak for the manner in which his instructors conduct their courses." In point of fact, his testimony on this point was as follows (R. 116): "Q. Would you not say that more attention would be paid to Missouri law as far as student instruction is concerned? I am not talking about instructors' research but about instruction. Reviewing your own course at Harvard in your under-

graduate course at Harvard; wouldn't you say that there was more student instruction given to the students of Missouri University in Missouri law than was given to you at Harvard, in Missouri law? A. That is not true in the courses I teach. I can't speak for absolutely every instructor." Petitioner criticizes Dean Masterson because he testified that he could not testify offhand as to the value of the University of Missouri law library. In fact, his testimony on this point was as follows (R. 191): "Q. Could you duplicate the University of Missouri library for fifty thousand dollars? A. I could not say—I don't know. Q. What is your best opinion as the dean of an approved law school? A. Well, I think I would have to have a little time, with a pencil and piece of paper and 20 or 30 minutes." Petitioner's counsel then stated that he would ask for the answer after 20 or 30 minutes; but apparently he forgot to do so, and the matter was never referred to again (R. 191-196).

Petitioner says (page 22 of his Brief) that respondents "could produce itemized figures as to railroad distances and railroad fares (R. 152), but displayed unbelievable unfamiliarity with the fiscal operation of their own school of law (R. 122-123)." The fact is, the railroad distances and fares were not testified to by any witness, but were stipulated by counsel (R. 152-153). While witness Stanford, assistant secretary of the University of Missouri, was unable offhand to give from memory the figures desired by petitioner's counsel (R. 121-123), he later went to the trouble of preparing detailed tabulations showing the information, and they were received in evidence (R. 124-125). This witness was not required to prepare these tabulations, yet he did so as a matter of accommodation to petitioner's counsel (R. 123). And now petitioner's counsel criticizes

Mr. Stanford as "unbelievable" because, without previous notice that the information would be desired, he could not from memory give the complicated figures in the tabulations.

Wholly apart from the gross unfairness of petitioner's attack on witnesses Masterson and Stanford, petitioner is in no position to attack these witnesses, because they were his own witnesses and he vouched for their credibility.

Dunn v. *Dunnaker*, 87 Mo. 597.
Cooper v. *Armour & Co.*, 222 Mo. App. 1176.
Choctaw & M. R. Co. v. *Newton*, (8 C. C. A.) 140 Fed. 225.

V.

Mandamus against respondents was not a proper remedy, because petitioner must exhaust his administrative remedies before seeking extraordinary relief; and this he failed to do.

It is a general rule, frequently applied by this court, that a suitor must exhaust his administrative remedies before seeking extraordinary relief (*Natural Gas Pipe Line Co. of America* v. *Slattery*, 58 Sup. Ct. Rep. 199, 204 and cases cited).

Petitioner concededly is entitled to an opportunity from the State of Missouri to obtain a legal education substantially equal to that provided by the state for other citizens of the state (R. 218). The Board of Curators of Lincoln University is the agency of the state entrusted with the power and charged with the duty to provide for petitioner this opportunity (R. 213-215, 219-222). Petitioner was entitled to demand from the Board of Curators of Lincoln University such opportunity; and if the opportunity were denied him, he was entitled to demand from

the board a right to be heard on the reasons upon which the board denied him the opportunity.

In point of fact petitioner never made any demand upon the Board of Curators of Lincoln University to provide him with such an opportunity (R. 218-219, 222); and the board has not denied him the opportunity. Until petitioner has sought to obtain from the Board of Curators of Lincoln University an opportunity for a legal education substantially equal to that provided by the state to other citizens of the state, and such opportunity has been denied him, and petitioner has sought a hearing from the board of the reasons upon which the board denied him such opportunity, petitioner is in no position to appeal to the courts for any remedy, and certainly not for mandamus, to compel the Board of Curators of Lincoln University to provide him with the opportunity for legal education which he says he desires, but which he has never requested from the authorities charged with the duty to provide it for him. *A fortiori*, petitioner could not appeal to the courts for mandamus to compel the Board of Curators of the *University of Missouri* to provide him with a legal education which he has not requested from the authorities charged with the duty to provide it for him (*Goldsmith* v. *United States Board of Tax Appeals*, 270 U. S. 117, 123; *Natural Gas Pipeline Co.* v. *Slattery*, 58 Sup. Ct. Rep. 199, 204; *Porter* v. *Investors' Syndicate*, 286 U. S. 461; *Petersen Baking Co.* v. *Bryan*, 290 U. S. 570, 575; *Ex parte Virginia Commissioners*, 112 U. S. 177).

IN CONCLUSION.

It is respectfully submitted that this case was properly decided by the Supreme Court of Missouri; and that petitioner's conceded right to equal facilities for education has not been denied. His refusal to avail himself of those facilities strongly suggests that his real purpose is to lend his name as litigant to those interested in furthering a movement to bring about social equality between the white and negro races. As we have pointed out, this is not a question which can be settled by laws or judicial decisions.

The State of Missouri has set up a complete and exclusive scheme and plan for the higher education of those negroes of the state who desire higher education. We submit that the plan is an entirely just, fair and adequate plan, under which any negro resident of the state may at the state's expense receive higher education in any branch of learning, including the law.

The policy of the state respecting separation of the races for purposes of education is believed by the people of the state to be a wise policy. Experience has shown it to be a wise policy. It has preserved order and discipline in the educational system. It has resulted in a steady advance in the education of each race. It has been established at an expenditure of millions of dollars.

The petitioner, in effect, asks this court to undo all this, and to overthrow the system of separate education ordained by the constitution, laws and public policy of

the state. It is respectfully submitted that petitioner makes no showing which would justify this revolutionary disruption of the state's educational system. We respectfully ask that certiorari be denied.

Respectfully submitted,

FRED L. WILLIAMS,
FRED L. ENGLISH,
NICK T. CAVE,
WILLIAM S. HOGSETT,
RALPH E. MURRAY,
Counsel for Respondents.

APPENDIX.

Appropriation acts by the Missouri General Assembly in favor of Lincoln University from 1921 to 1935, inclusive, but excluding $500,000 appropriation held unconstitutional in Lincoln University v. Hackmann, 295 Mo. 118.

(Laws Mo. 1921, page 65). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund for Lincoln institute, Jefferson City, the sum of three hundred twenty-nine thousand five hundred ($329,500) dollars, as follows:

Salaries	$ 80,000
Support	50,000
Expense of board	2,000
Burner equipment and repairs	7,500
Repairs	60,000
Land	30,000
New building:	
Dormitory	100,000
Total	$329,500.

(Laws Mo. 1921, page 101). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, for the payment of deficiency claim of the Lincoln institute, on file in the office of the state auditor, as follows: Missouri penitentiary electrical service rendered $595.56.

(Laws Mo. 1923, page 51). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, the sum of eleven thousand nine

hundred forty-six and 41-100 ($11,946.41) dollars, to pay the deficiency claims now on file in the state auditor's office on account of the salaries of the teachers and employees of Lincoln university for the years 1921 and 1922.

(Laws Mo. 1923, page 60). There is hereby reappropriated out of the state treasury, chargeable to the state revenue fund, the sum of forty-nine thousand three hundred thirty and 42-100 ($49,330.42) dollars, the same being the balance in the fund appropriated by the fifty-first general assembly for the construction of a dormitory at Lincoln university, Jefferson City, which is now under contract and in the course of construction; it being the intention of this act to appropriate, only, such amount as may be in the state treasury to the credit of said building fund at the time the act originally appropriating said money shall expire.

(Laws Mo. 1923, page 60). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, the sum of seventy thousand ($70,000.00) dollars, for the construction and equipment of a new heating and power plant and for furnishing and equipping the boys' new dormitory building at Lincoln university, Jefferson City, Missouri, as follows:

For the construction and equipment of a new power and heating plant	$50,000.00
For the furnishing and installing furniture and equipping the boys' new dormitory building	15,000.00
Total	$70,000.00

(Laws Mo. 1923, page 96). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund for Lincoln university, Jefferson

City, the sum of one hundred seventy-four thousand seven hundred thirty ($174,730) dollars, as follows:

Salaries	$113,000
Expense of board	2,000
Repairs	10,000
Support	49,730
Total	$174,730

(Laws Mo. 1925, page 57). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, the sum of nine hundred and ninety-six dollars ($996.00) to pay the deficiency claim of Lincoln university, on file in the state auditor's office, on account of supplies for the years 1923 and 1924.

(Laws Mo. 1925, page 78). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, for Lincoln university, Jefferson City, the sum of two hundred twenty-four thousand seven hundred dollars ($224,700.00), as follows:

Salaries	$154,000.00
Plant and upkeep:	
(Service employees; grounds (hot house, grading, lawn tools); buildings (academic-chapel enlargement and renovation, library furniture and books, repairs, academic furniture, enlarging and equipping dining room and kitchen)	10,000.00
General supplies:	
(Water, gas, light and power, fuel, telephone, printing, stationery, and publications, postage and tolls, janitorial supplies)	48,700.00

Facilities of instruction:	
(Chemical, physical, biological and psychological laboratories; musical instruments; machine shop; carpentry; auto mechanics; mechanical and free-hand drawing; printery; electrical fittings and plumbing; home economics supplies and equipment; livestock; implements)	10,000.00
Miscellaneous:	
(Curators; student labor; extension—field service)	2,000.00
Total	$224,700.00.

(Laws Mo. 1927, page 88). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, for Lincoln university, Jefferson City, the sum of two hundred seventy-eight thousand dollars ($278,000.00) as follows:

Salaries	$175,000.00
Plant and upkeep	15,000.00
General supplies	48,700.00
Facilities of instruction	20,000.00
Campus improvement and repairing President's house	9,300.00
Farm improvement	3,000.00
Library and laboratory equipment	5,000.00
Miscellaneous requirements	2,000.00
Total	$278,000.00.

(Laws Mo. 1929, page 24). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund for Lincoln university, Jefferson City,

the sum of three hundred six thousand five hundred dollars ($306,500.00) as follows:

Salaries and support	$180,000.00
Curators	2,000.00
Student labor	4,000.00
Dairy barn, tool house, hothouse and enlargement of poultry house	5,000.00
Campus improvement and repairing president's house	2,000.00
Farm improvement	1,000.00
Repairs on steam line, heating system and plumbing	6,000.00
Enlargement and remodeling dining room	4,000.00
Renovating two dormitories	5,000.00
Furniture for dormitories	3,000.00
Furniture for class rooms	3,000.00
Special repairs, roads, walks, campus, etc.	4,000.00
Enlargement of training school	2,000.00
Plant and upkeep	10,000.00
General supplies	42,500.00
Facilities of instruction	25,000.00
Library and laboratory equipment	5,000.00
Public lectures and extension	3,000.00
Total	$306,500.00.

(Laws Mo. 1929, page 61). There is hereby appropriated out of the state treasury chargeable to the state revenue fund for the years 1929 and 1930 the sum of fifteen thousand ($15,000.00) dollars to be used in paying the tuition of negro students to some standard college or university provided said students are pursuing courses in said college or university not offered at Lincoln university and which are being offered at the University of Missouri and also in providing high school

scholarships to Lincoln university, the amount of said scholarship to be determined by the state superintendent of schools, provided said student has completed the elementary course of study and lives in a district that does not provide high school facilities for negro children and does provide high school facilities for white children. The funds provided for in this section shall be paid out by the state treasurer upon vouchers properly approved by the state superintendent of schools and audited by the state auditor.

(Laws Mo. 1929, page 101). There is hereby appropriated out of the state treasury, chargeable to the general revenue fund the sum of two hundred and fifty thousand ($250,000.00) dollars for the construction and equipment of an educational building at Lincoln university at Jefferson City.

(Laws Mo. 1931, pages 27-28). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, * * *

For the use of the state superintendent of schools in paying the tuition of negro students who have completed at least two years of standard college education to some standard college or university, provided such said students are not pursuing courses in such college or university leading to the A.B. in liberal arts, or the B.S. in education but are pursuing courses in such college or university not offered at Lincoln university, but which are being offered at the university of Missouri; and, also, in providing high school scholarships to Lincoln university or fully accredited negro high schools in Mis-

souri, provided said high school students have completed the elementary course of study and lives in a district that does not provide high school facilities for negro children but does provide high school facilities for white children: the amount of such said scholarships to be determined by the state superintendent of schools. The fund provided by this appropriation shall be paid out of the state treasury upon vouchers properly drawn by the state superintendent of schools and audited by the state auditor ..... $15,000.00.

(Laws Mo. 1931, pages 41-47). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, for the payment of salaries, wages, and per diem of the officers and employees; for the original purchase of property; for the repair and replacement of property; for operative expenses and other purposes of * * * Lincoln university at Jefferson City and for Lincoln university to be used by its board of curators in the supervision and management of the demonstration farm and agricultural school for the negro race as now established at Dalton, * * * for the years 1931 and 1932, the following items and amounts:

A. Personal Service:

Salaries, wages and per diem of the president, deans, professors, and other employees, and student labor $200,000

B. Additions:

There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the unexpended balance of $250,000, ap-

propriated by the fifty-fifth General Assembly for the construction and equipment of an additional building at Lincoln university, in Jefferson City, such unexpended balance being 208,155

Operative equipment; laundry, cleaning and sanitation equipment, production and construction equipment 6,000

Total additions $414,155

C. Repairs and Replacements:

Buildings 10,000

Operative equipment, including educational and recreational equipment, household, kitchen and dining room equipment 18,000

Total repairs and replacements $28,000

D. Operation:

General expense; including communication, printing and binding, transportation of things, and travel 6,500

Material and supplies; educational, scientific and recreational supplies, grounds and roadways, material and supplies, household supplies, light, heat, power and water supplies, stationery and office supplies 72,000

Total operation $78,500

Total Lincoln university at Jefferson City, Mo. ..... $520,655.

(Laws Mo. 1933, page 9). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund the following sums, or so much thereof as

may be necessary for the purpose of paying the following deficiencies, reliefs and refunds:

* * * * * * * *

State Superintendent of Schools—Tuition, Negro Students $5,615.91

(Laws Mo. 1933, page 87). There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, for the years 1933 and 1934 the sum of ten thousand dollars ($10,000.00) to be used in paying the tuition of Negro college students to some standard college or university not located in Missouri, provided said students have completed at least sixty hours of standard college work, are *bona fide* residents of Missouri, and are not pursuing courses in such college or university leading to the A.B. degree in Liberal Arts or the B.S. Degree in Education, but are pursuing courses in such college or university not offered at Lincoln University but which are offered at the University of Missouri; provided that the total amount paid shall not exceed the difference between the registration and incidental fees charged by the University of Missouri to resident students and the school attended for similar courses; provided further, that the amount paid shall not exceed one hundred dollars ($100.00) per school year of nine months for undergraduate work and one hundred fifty dollars ($150.00) per school year of nine months for graduate work; provided further, that the tuition for all students attending terms of less than nine months shall be prorated on the above basis.

(Laws Mo. 1933, pages 119-131). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, for the payment of salaries, wages, and per diem of the officers and employees; for the

original purchase of property; for the repair and replacement of property; for the operative expenses and other purposes of * * * Lincoln university at Jefferson City, * * * for the years 1933 and 1934, the following items and amounts:

* * * * * * * * *

A. Personal Service:

Salaries of President, Business manager, Deans, Professors, Instructors, Physician, Librarian, Secretary, Registrar, Assistant Librarian, firemen, farmer, nurse and student labor $200,000

C. General and special repairs and operative equipment 16,000

D. Operation:

General expense; including communication, printing and binding, transportation of things, travel, educational, scientific and recreational supplies, farm and garden supplies, grounds and roadways material and supplies, household supplies, laundry, cleaning and sanitation supplies, light, heat, power, and water supplies, medical, surgical and hospital supplies, small tools, miscellaneous supplies and repairs, stationery and office supplies 70,000

Total Lincoln University at Jefferson City, Mo. ..... $286,000.

* * * * * * * * * *

Payable out of the "Lincoln University fund," as follows:

A. Personal Service:

Salaries of President, Business manager, Deans, Professors, Instructors, Physician, Librarian,

Secretary, Registrar, Assistant Librarian, firemen, farmer, nurse and student labor ..... $ 16,000

C. General and special repairs and operative equipment 2,000

D. Operation:

General expense; including communication, printing, and binding, transportation of things, travel, educational, scientific and recreational supplies, farm and garden supplies, grounds and roadways material and supplies, household supplies, laundry, cleaning and sanitation supplies, light, heat, power, and water supplies, medical, surgical and hospital supplies, small tools, miscellaneous supplies and repairs, stationery and office supplies 22,000

Total for Lincoln University at Jefferson City, Missouri, from funds $40,000

(Laws Mo. 1935, pages 54-67). There is hereby appropriated out of the state treasury, chargeable to the funds herein designated, for the payment of salaries, wages and per diem of the officers, teachers and employees; for the original purchase of property; for the repair and replacement of property; for the operative expenses and other purposes of * * * Lincoln University at Jefferson City * * * for the years 1935 and 1936, the following items and amounts:

* * * * * * * *

For Lincoln University, payable out of State revenue fund, as follows:

A. Personal Service:

Salaries of President, business manager, deans, professors, instructors, physician,

librarian, secretary, registrar, assistant librarian, firemen, farmer, nurse, and student labor $200,000.00

B. Additions:

Buildings, building equipment, operative equipment, water supplies and plumbing, educational and recreational equipment, laboratory and scientific equipment, furniture and equipment 100,000.00

C. Repairs and Replacements:

General and special repairs and operative equipment 20,000.00

D. Operation:

General expense; including communication, printing and binding, transportation of things, travel, educational, scientific, and recreational supplies, farm and garden supplies, household supplies, laundry, cleaning and sanitation supplies, light, heat, power, and water supplies, medical, surgical and hospital supplies, small tools, miscellaneous supplies and repairs, stationery and office supplies 80,000.00

Total Lincoln University out of State revenue fund ..... $400,000.00.

For Lincoln University, payable out of the Lincoln University Fund, as follows:

A. Personal Service:

Salaries of President, business manager, deans, professors, instructors, physician, librarian,

secretary, registrar, assistant librarian, firemen, farmer, nurse and student labor $12,000.00

C. Repairs and Replacements:

General and special repairs and operative equipment 2,000.00

D. Operation:

General expense; including communication, printing and binding, transportation of things, travel, educational, scientific and recreational supplies, farm and garden supplies, grounds and roadways material and supplies, household supplies, laundry, cleaning and sanitation supplies, light, heat, power, and water supplies, medical, surgical and hospital supplies, small tools, miscellaneous supplies and repairs, stationery and office supplies 20,200.00

Total for Lincoln University payable out of Lincoln University Fund ..... $34,200.00.

(Laws Mo. 1935, page 113). Tuition for Negro college students.—There is hereby appropriated out of the State Treasury chargeable to the general revenue fund for the years 1935 and 1936, the sum of Ten Thousand Dollars ($10,000.00) to be used in paying the tuition of negro college students to some standard college or university not located in Missouri, provided said students have completed at least sixty hours of standard college work, are *bona fide* residents of Missouri, and are not pursuing courses in such college or university leading to the A. B. degree in Liberal Arts, or the B. S. degree in Education, but are pursuing courses in such college or university not offered at Lincoln University, but which

are offered at the University of Missouri; provided that the total amount paid shall not exceed the difference between the registration and incidental fees charged by the University of Missouri to resident students and the school attended for similar courses; provided further, that the amount paid shall not exceed One Hundred Dollars ($100.00) per school year of nine months for undergraduate work, and One Hundred Fifty Dollars ($150.00) per school year of nine months for graduate work; provided further, that the tuition for all students attending terms of less than nine months shall be prorated on the above basis.